



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 489 OF 2004

KENYA AIRPORTS AUTHORITY.....APPLICANT

-VERSUS-

WAMBUA MILA1ST DEFENDANT

ELIJAH RUNO.....2ND DEFENDANT

CHARLES AGUTO.....3RD DEFENDANT

4TH TO 1062ND DEFENDANTS (AS PER THE LIST ANNEXED TO THE FURTHER AMENDED PLAINT AS MEMBERS OF UUNGANI SETTLEMENT SCHEME SELF HELP GROUP)

CONSOLIDATED WITH

ELC SUIT NO. 206 OF 2004

KENYA AIRPORTS AUTHORITY.....PLAINTIFF

VERSUS

PETER MUINDE MBITI.....1ST DEFENDANT

AGNES NJERI.....2ND DEFENDANT

JAMES NJOROGE MURIGI.....3RD DEFENDANT

SOLOMON MWAU.....4TH DEFENDANT

STEPHEN MWANIA.....5TH DEFENDANT

DOMINIC KATUA.....6TH DEFENDANT

AS OFFICIALS OF MULOLONGO BROTHERS ASSOCIATION

JUDGMENT

The Pleadings

ELCC No. 206 of 2004

The two suits before the court involve a dispute over L.R No. 21919 (hereinafter referred to only as “the suit property”). The first suit, ELCC No. 206 of 2004 was brought against six people who were sued in their capacity as officials of Mulolongo Brothers Association (hereinafter referred to only as “Mulolongo”). In its amended plaint dated 5th October, 2006 filed in ELCC No. 206 of 2004, Kenya Airports

authority (hereinafter referred to only as “the plaintiff”) averred that at all material times, it was the owner of the suit property that measured 4,674.60 hectares or thereabouts on the part of which it had erected an airport known as Jomo Kenyatta International Airport (hereinafter referred to only as “JKIA”). The plaintiff averred that on or about 2003, the defendants in ELCC No. 206 of 2004 represented to the public that Mulolongo was the owner of the suit property and that it was in the process of subdividing the suit property for the purposes of allocating the same to its members. The plaintiff averred that in furtherance of the said misrepresentation and fraud, the defendants in ELCC No. 206 of 2004 fraudulently and without legal right purported to allocate parcels of land that it had allegedly hived off the suit property to a number of people and Self Help Groups. The plaintiff averred that the defendants in ELCC No. 206 of 2004 had no proprietary interest in the suit property and as such any attempt on their part to sell the suit property or any part thereof was not only illegal but was also null and void.

The plaintiff averred that if the defendants in ELCC No. 206 of 2004 were not restrained by way of an injunction from dealing with the suit property, the plaintiff and the public in general stood to suffer irreparable loss and damage. The plaintiff sought the following reliefs against the defendants in ELCC No. 206 of 2004;

- i. A permanent injunction restraining the defendants and anybody claiming through them from advertising for sale, interfering with, alienating, sub-dividing or trespassing upon the suit property or any part thereof.
- ii. General damages.
- iii. Costs of the suit.

The defendants in ELCC No. 206 of 2004 did not amend their statement of defence following the amendment of the plaint that was done on 12th October, 2006. In their defence dated 17th March, 2004 to the original plaint, the defendants in ELCC No. 206 of 2004 denied that they had represented to the public that they owned the suit property and that they were in the process of subdividing the same for the purposes of allocating the same to their members. The defendants in ELCC No. 206 of 2004 averred that Mulolongo was the registered owner of L.R No. 13512 (“hereinafter referred to as “Plot No. 13512”) since 1986. The defendants in ELCC No. 206 of 2006 averred that Mulolongo subdivided Plot No. 13512 into 1800 plots which it allocated to its members. The defendants in ELCC No. 206 of 2004 averred that its members took possession of their sub-plots and proceeded to develop the same. The defendants in ELCC No. 206 of 2004 averred that although the suit property and Plot No. 13512 were adjacent to each other, they were separate and distinct parcels of land. The defendants in ELCC No. 206 of 2004 averred that they had no interest in the suit property. They averred that the plaint disclosed no cause of action against them and urged the court to dismiss the plaintiff’s suit with costs.

ELCC No. 489 of 2004

In ELCC No. 489 of 2004, the plaintiff averred that on or around 2003, the 1st, 2nd and 3rd defendants in the suit misrepresented to the public in general that Uungani Settlement Scheme Self Help Group (hereinafter referred to only as “Uungani”) was the owner of the suit property or part thereof and that it was in the process of subdividing the suit property or part thereof for the purposes of allocating portions of the same to its members at a consideration. The plaintiff averred that around the same year, the defendants in the said suit wrongfully entered the suit property and occupied the same. The plaintiff averred that the 1st, 2nd and 3rd defendants in the suit also incited and caused the 4th to 1062nd defendants who are members of Uungani to enter the suit property and to take possession thereof. The plaintiff averred that the 1st, 2nd and 3rd defendants fraudulently and illegally purported to allocate the plots hived off the suit property to the members of Uungani. The plaintiff averred that the defendants acted fraudulently by alleging that Uungani owned the suit property or part of it and that it had offered the same for sale to the 4th to 1062nd defendants. The plaintiffs averred that Uungani had no proprietary interest in the suit property and as such its intention to sell the suit property or any part thereof was illegal, null and void. The plaintiff averred that since Uungani was not a legal body capable of owning land, the letter of allotment dated 5th January, 1998 that was issued to it over “Unsurveyed Plot “B” Mavoko Municipality” or L.R No. 14231 was void *ab initio*.

The plaintiff averred that if the defendants in ELCC No. 489 of 2004 were not restrained by way of an injunction from dealing with the suit property, the plaintiff and the public in general would suffer irreparable loss and damage.

The plaintiff sought judgment against the defendants in ELCC No. 489 of 2004 for;

- i. A permanent injunction restraining the defendants or anybody claiming through them from advertising for sale, interfering with, alienating, sub-dividing, or trespassing upon the suit property or any part thereof.
- ii. A declaration that the letter of allotment dated 5th January, 1998 issued to Uungani over “Unsurveyed Plot “B” Mavoko Municipality” or L.R No. 14231 is void *ab initio*.
- iii. General damages
- iv. Costs of the suit.

The defendants in ELCC No. 489 of 2004 filed further re-amended defence and counter-claim on 24th September, 2015. The defendants in ELCC No. 489 of 2004 denied that the plaintiff was the owner of the suit property. The said defendants also denied that they misrepresented to the public that they were the owners of L.R No. 24937 or L.R No. 21919 (“the suit property”). The defendant in ELC No. 489 of 2004 averred that the parcel of land that was occupied by Uungani was not part of the parcel of land owned by the plaintiff. The defendants in ELC No. 489 of 2004 averred that the parcel of land which they were occupying was allocated to them lawfully by the Commissioner of Lands.

The defendants in ELC No. 489 of 2004 averred that the parcel of land that was occupied by them was known as L.R No. 14231/1 measuring 449.9 hectares or thereabouts (hereinafter referred to only as “Plot No. 14231/1” or “Plot No. 14231” as the context permits). The defendants in ELC No. 489 of 2004 averred that they paid all the necessary charges for Plot No. 14231/1 which is delineated in Deed Plan No. 285225 dated 25th March, 2008 to the Commissioner of Lands under file No. 242202. The defendants in ELC No. 489 of 2004 denied that Ungani acquired Plot No. 14231/1 fraudulently or through misrepresentation.

The defendants in ELC No. 489 of 2004 averred that it was the plaintiffs who were guilty of misrepresentation, non-disclosure of material facts and fraud. The defendants in ELC No. 489 of 2004 set out the particulars of the plaintiff’s alleged acts of fraud. The defendants in ELC No. 489 of 2004 denied that they were trespassers on the suit property. The defendants in ELC No. 489 of 2004 averred that the plaintiff’s suit was incomplete and fatally defective. The defendants in ELC No. 489 of 2004 averred that title No. I.R No. 90243 for L.R No. 24937 and/or in the alternative title No. I.R 70118 for L.R No. 21919 (the suit property) illegally encroached upon and/or annexed Plot No. 14231/1 that was lawfully allocated to the defendants and interfered with its boundaries and beacons that resulted in the demolition and/or destruction of immovable and movable structures valued at billions of shillings.

In their counter-claim, the defendants in ELC No. 489 of 2004 averred that the title that was issued to the plaintiff that encroached on Plot No. 14231/1 measuring 449.9 hectares owned by the defendants should be cancelled. The defendants in ELC 489 of 2004 averred that after Plot No. 14231 was allocated to them, they invested heavily on the same by purchasing and developing their individual sub-plots with the approval of the Commissioner of Lands and the defunct Mavoko Municipal Council. The defendants in ELC No. 489 of 2004 averred that they went to great length, sacrifice and cost to put up modern up-market residences on Plot No. 14231/1 in line with their aspirations and legitimate expectations. The defendants in ELC No. 489 of 2004 averred that the plaintiff knowingly, recklessly and maliciously with unprecedented impunity of the highest order and in disregard of the rule of law and due process contemptuously entered Plot No. 14231/1 illegally on the week commencing 11th November, 2011 with mighty show of brutal and raw force and demolished and flattened all the developments thereon and evicted the defendants and all other persons who owned plots therein irrespective of whether they had developed their plots or not. The defendants set out the particulars of the plaintiff’s alleged malice.

The defendants in ELCC No. 489 of 2004 averred that the demolitions were extended by the plaintiff to the neighbouring parcel of land namely, L.R No. 13512 (“Plot No. 13512”) that was allocated to Mulolongo. The defendants in ELCC No. 489 of 2004 averred that at the end of the demolition exercise that took 4 days, there was nothing left standing on Plot No. 14231/1 and plot No. 13512 but devastation. The defendants in ELCC 489 of 2004 averred that they were put to great loss, suffering, misery and damage that had no place in a civilised nation as a result of the callous, inhuman and unconstitutional acts of the plaintiff aforesaid which were also against all known international protocols protecting human rights and dignity that Kenya had subscribed to. The defendants in ELC 489 of 2004 averred that no or any adequate notice or court order was served upon them before the demolition aforesaid. The defendants in ELC No. 489 of 2004 averred further that they were not afforded an opportunity by the plaintiff to salvage their personal effects and chattels that included among others, school books and learning materials for their children. The defendants in ELC No. 489 of 2004 averred that as a result of the demolition of their houses and other structures that they occupied, they were rendered homeless, destitute and financially crippled and/or insolvent.

The defendants in ELCC No. 489 of 2004 averred that the Commissioner of Lands having received from them a sum of Kshs.3 million in 2002, he was contractually bound to issue the defendants in ELC No. 489 of 2004 with a title deed. The defendants in ELC No. 489 of 2004 averred that failure by the Commissioner of Lands to issue them with a title deed was illegal and unconstitutional having regard to the fact that the Commissioner of Lands had never offered to refund the payment that had been made by the defendants in ELC No. 489 of 2004.

The defendants in ELCC No. 489 of 2004 averred that at no time were they informed that the parcel of land that was allocated to them was not available for allocation. The defendants in ELC No. 489 of 2004 averred further that the plaintiff did not raise any objection to the structures that they had put up on the said parcel of land. The defendants in ELC No. 489 of 2004 averred that the contention by the plaintiff that they were a security risk was an idle, discriminative and imaginative speculation. The defendants in ELC No. 489 of 2004 averred further that the allegations that they were a hindrance to the expansion of Jomo Kenyatta International Airport was a smoke screen for the plaintiff’s management that had ulterior motives against them. The defendants in ELC No. 489 of 2004 averred that only part of L.R No. 3864 was within Nairobi and that the rest was in Machakos County. The defendants in ELCC No. 489 of 2004 averred that the plaintiff had two parallel titles for JKIA. The defendants in ELCC No. 489 of 2004 averred that the initial title was L.R No. 24937, I.R No. 90243 that was cancelled in favour of a new title for L.R No. 21919, I.R No. 70118 (“the suit property”) that was irregularly, fraudulently and illegally created. The defendants in ELCC No. 489 of 2004 averred that the plaintiff had never explained how it acquired the title for the suit property. The defendants in ELCC No. 489 of 2004 averred that instead of the plaintiff prosecuting this suit to its logical conclusion for the determination of the issue of ownership of the suit property, the plaintiff acted with impunity and carried out demolitions and evictions complained of.

The defendants in ELCC No. 489 of 2004 sought judgment against the plaintiff by way of a counter-claim for;

- i. The dismissal of the plaintiff’s suit.
- ii. A declaration that the actions of the plaintiff to interchangeably hold title for L.R No. 24937 and title for L.R No. 21919 for the same parcel of land for JKIA is an act of fraud, illegal and unlawful and not provided for under any known law.
- iii. A declaration that the plaintiff’s titles for L.R No. 21919 and L.R No. 24937 are null and void.
- iv. A declaration that the defendants did not trespass into the plaintiff’s property.
- v. A declaration that L.R No. 14231 is legally the property of the defendants.
- vi. An order that the National Land Commission do issue an original title deed in respect of L.R No. 14231 within 30 days of judgment.

- vii. A declaration that the defendants' legitimate expectations were grossly violated.
- viii. An order cancelling the title held by the plaintiff in respect of L.R No. 24937 and/or L.R No. 21919 which annexed L.R No. 14231.
- ix. A permanent injunction restraining the plaintiff from interfering with the defendants' peaceful and quiet occupation and possession of L.R No. 14231.
- x. A declaration that the demolition and eviction carried out by or at the behest of the plaintiff was undertaken illegally and with impunity contrary to the rule of law and due process.
- xi. A declaration that the rights of the defendants under Articles 19, 20, 21, 22, 25(a), 27, 28, 29(f), 39, 40, 43, 45, 47, 50(1), 53(c), 57(c) and 64 of the Constitution were grossly and blatantly infringed and/or denied to the defendants' detriment.
- xii. A declaration that pursuant to Article 2(6) of the Constitution, the rights of the defendants under among others International Convention on Economic, Social and Cultural Rights, International Convention on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights, the African Charter on Human Rights and Peoples Rights, the Vienna Declaration and Program of Action and the Convention on Elimination of all forms of Discrimination Against Women were grossly and monstrously violated.
- xiii. A declaration and an order that the defendants be restored back to the position and status in which they were before the demolition and evictions that were carried out from 12th November, 2011 and/or in the alternative be compensated by way of special, ordinary and exemplary and/or aggravated damages as shall be assessed upon production of evidence and proof of damage at such time and terms as the court shall be pleased to direct.
- xiv. Any other relief that the court may deem fit to grant.
- xv. The costs of the suit.

The plaintiff filed a reply to the amended defence and counter-claim by the defendants in ELCC No. 489 of 2004 on 23rd October, 2008. In its reply, the plaintiff joined issue with the defendants in ELCC No. 489 of 2004 in their amended defence. The plaintiff reiterated and adopted the contents of its further amended plaint in reply to the averments in the defence by the defendants in ELCC No. 489 of 2004. In its defence to the counter-claim by the defendants in ELCC No. 489 of 2004, the plaintiff averred that the orders that were sought in the counter-claim could not issue because the plaintiff was the owner of the suit property and had a valid grant in respect thereof while the defendants in ELCC No. 489 of 2004 had no title legal or otherwise over the suit property. The plaintiff urged the court to enter judgment in its favour as prayed in the amended plaint and for the counter-claim by the defendants in ELCC No. 489 of 2004 to be dismissed.

The Interested Parties

In the course of the proceedings, some other groups namely, Jumbo Community Self Help Group and Mavicor Self Help Group joined the suit as interested parties. I am unable to ascertain from the record whether they were granted leave by the court to join the suit or not. These parties did not file any pleadings save for notices of appointment of advocates. They did not also give evidence at the trial.

The evidence by the parties

The Plaintiff's case

At the trial, the plaintiff gave opening statement and called two witnesses. The plaintiff's first witness was its Chief Legal Officer, JOY NYAGA. JOY NYAGA left the employment of the plaintiff before she was cross-examined and her evidence was withdrawn by the plaintiff. The plaintiff then called RASHID ALI as the its first witness. RASHID ALI(PW1) told the court that he was working with the plaintiff as a surveyor and that he was familiar with the dispute. He stated that the plaintiff was the owner of L.R No. 21919, I.R No. 70118 (the suit property). He stated that the title for the suit property was issued pursuant to a Deed Plan No. 205580 dated 21st May, 1996 that reflected the boundaries of the plaintiff's land which is commonly known as JKIA. PW1 stated that the defendants had encroached on the plaintiff's land towards Syokimau. PW1 stated that the Commissioner of Lands had confirmed that the letters of allotment held by the defendants were not genuine. He stated that the defendants were not entitled to the parcels of land which they were claiming because the same formed part of the plaintiff's land (the suit property).

He stated that the land claimed by the defendants was acquired by the government in 1971 through Legal Notices Nos. 1105 and 1106 for the expansion of Jomo Kenyatta International Airport (JKIA). He stated that through Legal Notice No. 201 of 1994 all the land formerly owned by the Aerodromes Department was vested on the plaintiff. PW1 stated that the defendants were forcefully evicted from the suit property through a cabinet decision. He stated that after the defendants were evicted from the suit property, a Parliamentary Committee was formed to investigate the matter which committee came up with a report. PW1 stated that the Commissioner of Lands and Director of surveys appeared before the Parliamentary Committee and confirmed that the land that was occupied by the defendants belonged to the plaintiff and that the letters of allotment purported to have been issued by the Commissioner of Lands to Uungani were forgeries. He stated that the Director of Surveys confirmed that L.R No. 13512 and L.R No. 14231 claimed by the defendants were part of L.R No. 3864 that was compulsorily acquired by the government through Gazette Notice No. 1106 dated 30th April, 1971 for the expansion of JKIA. PW1 stated that the defendants did not have a valid claim against the plaintiff and urged the court to grant the orders sought against the defendants.

PW1 was recalled and gave further evidence in chief and was cross-examined. In his evidence in chief upon recall, PW1 adopted the contents of his statement filed in ELCC No. 206 of 2004 and his earlier evidence. He told the court that the two surveys that were carried out

by the Director of Surveys following the orders that were made by the court confirmed that L.R No. 14231 and L.R No. 13512 claimed by the defendants were within the suit property. He reiterated that the Commissioner of Lands told the Parliamentary Committee that the letters of allotment that were purportedly issued in respect of L.R No. 14231 and L.R No. 13512 claimed by the defendants were forgeries. PW1 stated that before the demolition of the structures that the defendants had put up on the disputed portion of the suit property, there was a Cabinet directive to secure all airports particularly those that had been encroached onto. He stated that the directive was issued on the basis of the fact that airports are security installations and at the time, there was a threat of terrorism.

PW1 stated that it was not the plaintiff which carried out the demolitions as the defendants had claimed in their defences. He stated that the demolitions were carried out by the government. He denied that the plaintiff was involved in the demolition and stealing of the defendants' properties. He stated that the said demolitions were carried out within the plaintiff's land. PW1 stated that the defendants were given several notices before the demolitions aforesaid were carried out. He stated that as at 1st December, 2004 when the court ordered that a survey be carried out to determine the extent of the plaintiff's land, there were no structures on the disputed portion of the suit property. He stated that when the court made an order that the status quo be maintained, the defendants proceeded to put up structures on the disputed portion of suit property which were not approved by the plaintiff. PW1 stated that the plaintiff had only one title for the suit property namely; L.R No. 21919. He stated that L.R No. 24937 came about as a result of a re-survey. He stated that after the 1996 survey that gave rise to L.R No. 21919, the Commissioner of Lands observed that the plaintiff had included into its land Mombasa Road and requested the plaintiff to carry out a re-survey of L.R No. 21919 to excise Mombasa Road from its land.

PW1 stated that this re-survey was done at the height of land grabbing in the country and the plaintiff's land was not spared. He stated that the plaintiff lost a lot of its land during this re-survey exercise that gave rise to L.R. No. 24937. He stated that due to the loss of land that the plaintiff suffered during this exercise, the title for L.R No. 24937 was cancelled and the plaintiff reverted to its old title, L.R No. 21919. He stated that even after the aborted re-survey, L.R No. 14231 and LR No. 13512 claimed by the defendants remained inside the plaintiff's land.

PW1 stated that the defendants no longer had structures on the suit property. He stated that after the demolition of the structures that had been put up on the disputed portion of suit property, the plaintiff fenced the whole of its land. He stated that the suit property was within Nairobi County according to its title and survey plan. PW1 reiterated that the defendants had no valid claim to the suit property.

The plaintiff's second witness was GEORGE KAMAU (PW2). PW2 adopted his witness statements that were filed in ELCC No. 489 of 2004 and ELCC No. 206 of 2004 as part of his evidence in chief and produced the documents attached to those statements as exhibits. In his testimony before the court, PW 2 stated as follows. He was an advocate of the High Court of Kenya and worked for the plaintiff as a legal officer between 2007 and 2015. He was familiar with the dispute before the court. The suit property belonged to the plaintiff. The plaintiff had never subdivided the suit property. Jomo Kenyatta International Airport (JKIA) comprising of the terminal buildings, the runway, the aprons, the cargo terminal offices and other associated facilities were situated on the suit property. There were plans to expand JKIA by constructing a second runway and associated facilities. JKIA was an important national asset. The parcels of land claimed by Mulolongo and Uungani were inside the suit property and the same had never been sold by the plaintiff. Uungani and Mulolongo had encroached on the suit property to which encroachment the plaintiff did not consent.

The plaintiff inquired from the Commissioner of Lands about the alleged allotment of part of the suit property to the Uungani and Mulolongo and the Commissioner of Lands disowned the alleged allotments. The alleged allotments were subsequently revoked. The plaintiff thereafter gave notices to those who had encroached on its land to vacate. Kenya was a signatory to many treaties and conventions concerning airports with the notable one being the International Civil Aviation Convention of 1944 also known as "The Chicago Convention." Annexure 17 of the convention deals with the security of International Civil Aviation. Annexure 14 of the Convention deals with aerodromes more particularly ground environment and airspace. It provides that airports must be free from of obstacles for free take-off and landing. In addition to the said international treaties and conventions, Kenya also has the Civil Aviation Act, Chapter 394 Laws of Kenya and the regulations made thereunder which deal with security of airports.

The defendants' encroachment on the suit property was not only an act of trespass but was also a breach of the said international instruments and local law. Airports are security installations and as such are sensitive areas. The same are exposed to acts of terrorism. Irregular erection of structures at the airport is also a hazard to safe aviation. Some of the defendants had erected permanent structures on the suit property. The government of Kenya out of security concerns at JKIA carried out an operation that removed all the structures that had been erected inside the airport in 2011. After the said demolitions which the government maintained was proper and lawful, the plaintiff fenced off its entire parcel of land. The defendants were no longer occupying the plaintiff's land. The portion of the suit property claimed by the defendants had been earmarked for the construction of the second runway and another cargo terminal. PW2 urged the court to grant the reliefs sought by the plaintiff in the two suits against the defendants.

After the close of the plaintiff's case, the defendants made an opening statement and thereafter called four witnesses. The defendants' first witness was DAVID WAMBUA MILA (DW1). DW1 adopted his witness statement dated 28th November, 2016 as part of his evidence in chief. He stated as follows in his testimony before the court. The land in dispute was situated in Mavoko sub-county, Machakos County in an area known as Uungani. The area was originally known as Kwandangi. It was initially occupied by a white settler known as Douglas Watson. "Kwandangi" is the Kamba version of the name Douglas. He settled in the area in June, 1986. The white settler told him that most of his land had been acquired by the Government for the expansion of the airport. The government only took a portion of the white settlers' land for noise buffer zone. The government later acquired all the land that was owned by the while settler. A portion of the acquired land was given to the plaintiff for the expansion of JKIA while a portion of the land remained government land. The parcels of land that were surveyed and allocated to the plaintiff were L.R No. 9042/56 and L.R No. 9042/57. It is the land that remained from the land that was acquired by the government for the expansion of the airport that was allocated to the defendants after they made an application to be allocated the same.

The defendants were encouraged to apply for the said government land by Douglas Watson who was concerned that the workers who used to work for him would suffer and would be rendered destitute. The defendants applied for the land as Uungani Settlement Scheme Self Help Group(Uungani). The group was registered as a welfare group. Uungani was issued with a letter of allotment dated 20th September, 1996. The land that was allocated to them was indicated as situated in Athi River, Machakos. Uungani paid the charges that were required under

the letter of allotment in the sum of Kshs. 5,734,040/=. The payment was made to the government for L.R No. 14231/1(Plot No. 14231/1). A deed plan was issued for Plot No. 14231/1 on 19th March, 2008 but not a title deed. The said deed plan also shows that the land was in Mavoko Municipality, Machakos.

The deed plan was prepared by the Director of surveys. Although they started the process of acquiring the suit property in 1996, it was until 2008 that they were issued with a deed plan. When they were issued with a letter of allotment in 1996, they were unable to pay the charges that were required. They were workers of Douglas Watson. Uungani recruited more members to raise the required charges. When they ultimately made the payment, the same was accepted by the government. They thereafter engaged a surveyor who subdivided the land. They allocated portions thereof to their members who put up a beautiful settlement on the land that was allocated to them. Their surveyor prepared a subdivision scheme that was submitted to Mavoko Municipality for approval. They spent over Kshs. 5,000,000/- to subdivide the land. They also had electricity connected to the area and dug boreholes for water supply. They also graded the roads of access to the parcel of land.

When the plaintiff came to court, the court issued an order for the status quo to be maintained meaning that the defendants were to remain in occupation of the parcels of land in dispute pending the hearing of the suit. The court had also ordered that a survey be done to establish the boundaries of the plaintiff's land and the land that they were claiming. During the survey, it was established that the land claimed by the defendants was in Machakos and the defendants and the plaintiff were shown the boundaries of their respective parcels of land. A re-survey was done also on the order of the court and once again, the defendants were shown the boundaries of their parcel of land. The defendants continued to occupy their parcel of land pending the hearing of this suit. All was well until one Saturday morning when the plaintiff descended on the defendants' properties with heavy machinery. The plaintiff had earlier been asked in writing not to carry out the demolitions of the defendants' buildings on the disputed parcels of land. The defendants had heard of the plaintiff's plan to demolish their structures. Since the plaintiff came on a Saturday to carry out the demolitions, the defendants could not come to court for redress.

The plaintiff's agents who were involved in the demolition were very violent. They threatened to hit the area MP with a bull dozer. It was a scene from hell. The children were crying and women wailing. Several buildings were brought down. It was the plaintiff which trespassed on the defendants' land and proceeded to destroy their buildings. The operation involved several bull dozers and the administration police were present to provide security to those carrying out the demolition. In the end of it all, all the houses were demolished including the water towers. There was looting during the exercise. The defendants were defenceless. They were ambushed. After the demolition, many of the defendants became sick and many children dropped out of school.

The defendants were not given notice before the demolitions were carried out. No notice was sent to Uungani or Kwandangi residents. Those who were served with notices were residents of Syokimau estate who were not even evicted. The defendants were devastated. He was seriously affected together with his family. He had to hide for some time. He lost face. He was being called a fraudster. He lost friends. He had to relocate to his rural home. Before that, he had to rent a house. His son was forced to repeat a year in the University. The defendants lost churches and schools. The children had to move to other schools. The payment that they made to the government was also not refunded. He became semi-impotent because of the stress. He could not perform sexually as he used to do. Many of the defendants were sick as a result of stress. Women lost husbands due to the stress.

Investigations were carried out by the police on the circumstances under which Uungani was allocated Plot No. 14231/1 and no fault was found on the part of the officials of Uungani. The investigations confirmed that the land was allocated to Uungani and that they had paid for it. They were not charged in court in relation to the allocation of the said parcel of land. The demolition affected not only Uungani; Mulolongo, Jumbo Settlement Group and Mavirko Self Help Group were also affected. That explained why they were joined in the suit. All these groups were also in occupation of the government land that remained after a portion of the land that was acquired by the government for expansion of the JKIA was allocated to the plaintiff.

DW1 stated further that the defendants were not interested in L.R No. 21919 or L.R No. 24937 that the plaintiff claimed to own. Their interest was in L.R No. 14231/1 situated in Mavoko Sub-County, Machakos County. He stated that the defendants land was not situated in Nairobi County. He denied that they purported to own the plaintiff's land and advertised the same for sale to the public. He stated that members of Uungani joined the group voluntarily and contributed money to purchase the land in dispute. He denied that the land in dispute was hived off the plaintiff's land. He stated that the land owned by Uungani was surveyed in 1987 and was allocated to them in 1996. He stated that JKIA is a protected area and as such there was no way they could have gained access to hive off a portion thereof for occupation.

DW1 stated that the plaintiff perpetrated fraud against the defendants the particulars of which the defendants had pleaded in their counter-claim. He denied that the land claimed by the defendants was acquired compulsorily by the government for the plaintiff. He stated that it was the plaintiff that had grabbed the defendants' land since the plaintiff had not proved that the land was allocated to it. He stated that the land from which the defendants were evicted was being used as a dumping site and that no runway had been built thereon. He stated that the defendants' land was outside JKIA and that even the land that was reserved by the plaintiff for future runway for JKIA was inside the plaintiff's land and not on the defendants' land. DW1 reiterated that Uungani owned L.R No. 14231/1 while L.R No. 14231/2 was owned by the other defendants. He stated that the plaintiff acted maliciously in demolishing the defendants' structures on the disputed parcel of land. He urged the court to grant the reliefs sought by Uungani in its counter-claim against the plaintiff. He stated that members of Uungani were suffering and that they should be allowed to go back to their land as they await compensation.

DW1 produced the documents attached to the defendants' list of documents dated 2nd December, 2017 as D Exh. 1 save for the Digital Versatile Disk (D.V.D) that was produced separately as D Exh. 2. By consent of the parties the DVD was played in court to show the court the demolitions that took place on the disputed parcels of land before DW1 continued with the evidence in chief. The DVD contained video clips from the main media houses recorded during the demolition exercise. DW1 stated that the videos showed how the residents were affected by the demolition physically and emotionally. He stated that the videos also showed that the demolitions were carried out by the plaintiff and the Ministry of Transport. He denied that the demolition was carried out following a cabinet decision. DW1 denied that the defendants were land grabbers. He stated that the maps or plans that were used by the plaintiff to grab the defendants' land were drawn by the plaintiff itself and not by the Director of Surveys. He stated that the demolitions were carried out without a court order. He stated that they were residents of Kwa Ndangi and not Syokimau and that their residences were not on JKIA flight path. He stated that the Parliamentary Committee that investigated the eviction and the demolition of the defendants' structures on the disputed land recommended

that the defendants be settled back on the land and that the recommendation was not honoured.

The defendants second witness was LIVINGSTONE KAMANDE GITAU (DW2). DW2 was a surveyor. He testified as follows: He was engaged by Uungani, Jumbo, Mulolongo and Mavirko to carry out survey on the disputed land. He adopted his witness statement as part of his evidence in chief. The statement was produced in evidence as part of DEExh. 1. According to his observations, L.R No. 14231 was created by the government and allocated to Uungani. In the course of his survey, he came across two (2) reports. One of the reports had been prepared by Surv Plans. Surv Plans had been engaged by the plaintiff to re-establish beacons for JKIA. In their report, Surv Plans observed that JKIA land measured 4674 Ha. but on the ground, the available land measured 4445.2 Ha. The said two reports that were commissioned by the plaintiff reached the same conclusion that he had reached namely; that JKIA had encroached on private properties. A recommendation was made that the measurements of JKIA land be regularised so that the properties which had been annexed as part of JKIA land are excluded.

The other report was prepared by the Director of surveys for the court. In the report, the Director of surveys observed that L.R No. 21919 was surveyed in 1996 and that the survey that gave rise to the said parcel of land enclosed other surveys that had been carried out earlier including the surveys for the land that was allocated to the defendants. The said report by the Director of surveys had observed that L.R No. 14231/1 and L.R No. 14231/2 claimed by the defendants herein had been absorbed by L.R No. 21919. DW2 stated that in his report, he questioned the creation of L.R No. 21919 (suit property). He stated that the suit property included Mombasa Road. He stated that the Director of surveys should not have accepted the survey plans for the suit property. He stated that the survey plans should have been returned to the surveyor who prepared the same so that Mombasa Road and other parcels of land that were annexed as part of the suit property could be removed. He stated that apart from the two parcels of land mentioned above, L.R No. 3864/R was also included as part of the suit property. L.R No. 3864/R was government land that remained from the land that had been acquired by the government in 1971. He stated that L.R No. 3864 was vested in the plaintiff in 1971 through Kenya Gazette Volume LXXIII – No. 18 of 30th April, 1971. He stated that L.R No. 3864 had been acquired compulsorily by the government. He stated that only part of L.R No. 3864 namely L.R No. 9042/59 was given to the plaintiff.

DW2 stated that the title for L.R No. 21919 was surrendered by the plaintiff and the plaintiff was issued with a new title. He stated that when a title is surrendered, it ceases to exist together with its deed plan. He stated that the plaintiff was issued with a new title for L.R No. 24937. He stated that upon the creation of L.R No. 24937, the suit property ceased to exist. DW2 stated that the plaintiff could not have two titles for the same parcel of land. He stated that a title that had been surrendered could not be resurrected. DW2 stated that L.R No. 14231/1 and LR No. 14231/2 claimed by the defendants existed independently from the plaintiff's parcel of land and that the same were situated in Machakos County.

The defendants' next witness was GIDRAPH KURIA MUTUGI (DW3). DW 3 was a valuer. He told the court that he had prepared a valuation report in relation to the parcels of land situated within L.R No. 14231. He stated that he was instructed in October, 2015 while this suit was pending. He stated that he did some investigations regarding L.R No. 14231 and also obtained some documents from the defendants which showed that the defendants had been in occupation of said parcel of land and that the same had been allocated to them by the government. He stated that once the land was allocated to the defendants and the defendants accepted the allotment and paid the requisite fees the land ceased to be public land and became private land.

He stated that what the defendants were not issued with was a title. He stated that he went to the site and found the same fenced. He stated that the defendants had been evicted from the land by the plaintiff with the assistance of other people who also claimed the land. He stated that due process was not followed in acquiring the land from the defendants. He stated that under the Land Acquisition Act, Chapter 295 Laws of Kenya (now repealed), the land had to be gazetted for acquisition and thereafter valued. He stated that under the Land Acquisition Act, the valuation date is the date of gazettelement of the property for acquisition.

He stated that in this case, that date did not exist because the land was not gazetted for acquisition. He stated that due to lack of that date, no valuation could be carried out for the purpose of acquisition of the defendants' parcels of land. He stated that the defendants gave him some documents to assist him with the valuation which included copies of the allotment letter and an order that was issued by the court requiring the parties to maintain the status quo and for a survey to be carried out on L.R No. 24937 and L.R No. 14231.

He stated that since the plaintiff did not comply with the said order of status quo, he decided to carry out valuation not on the basis of the acquisition of L.R No. 14231 by the plaintiff but for beneficial occupation by the plaintiff of the defendants' land for a period exceeding 8 years as at the time he was giving evidence. He stated that when the defendants were evicted, they had to look for comparable accommodation elsewhere. He stated that his valuation related to loss of use of the defendants' land and beneficial occupation of the same by the plaintiff. He stated that he had not included damage to buildings and such other claims such as mense profits.

He stated that his valuation was restricted to land. He stated that he valued loss of use and alternative accommodation at Kshs. 19,003,750,000/= inclusive of statutory additions for the members of Uungani. For the members of Jumbo, loss of use and cost of alternative accommodation was valued at Kshs. 8,715,850,000/= inclusive of statutory additions. DW3 produced the report in evidence as DEExh.3. DW3 stated further that after L.R No. 3864 was acquired by the government, the government could use it for different purposes of a generic nature as and when needed after the primary use had been satisfied. He stated that when land is acquired for a particular purpose the remainder can be used for other purposes.

The defendant's last witness was ROSE ANNE ONYANGO (DW4). DW4 testified as follows: She was a widow and had a family. She had recorded a witness statement that she adopted as part of her evidence in chief. She could recollect what happened on 11th and 12th December, 2011. On 12th December, 2011 she did not go to work or to church. What happened was so sad. (Witness broke down and started wailing at this point). She thought that the country was at war. She could not imagine that it was the government that had come to fight its own people. There were bull dozers and policemen everywhere. She was not aware that her house was going to be brought down. She saw houses being demolished. The intervention of the area Member of Parliament did not halt the demolitions. Their residences were at Mavoko, Machakos County. She was so much affected by the incident. They had no notice prior to the demolitions. They were not engaged even by the local administration. The whole episode was painful. Being a widow, she lost so much. Her children also suffered. She had not

recovered from the incident. She watched as the bull dozers brought down her house. Many of her things were destroyed. Those which were not damaged were looted by the mob. The demolitions were carried out when it was raining. She hired a guard to look after what remained in her home. She had taken a loan from a Savings and Credit Cooperative Organization (Sacco) to enable her settle on the property. After the demolition, she had to rent a house.

She had a daughter at the University and a son in school. She was forced to sell her car. Her nose started to bleed as a result of the experience. Her blood pressure went up and had not normalised. She had to continue with daily medication which affected her income. She did not have the problem of nose bleeding before the traumatic experience during the demolition. She had to continue going for regular medical check-up. Due to high blood pressure, her legs swell. She was paying a rent of Kshs. 27,500/= for the house she relocated to. She then moved to another house where the rent was Kshs. 45,000/= inclusive of service charge. She pleaded with the court to assist her and the other defendants to get back their plots and to be compensated for their losses.

After the close of the defendants' case the court directed the parties to make submissions in writing. The plaintiff filed its submissions on 7th July, 2020 while the defendants filed their submissions on 24th July, 2020.

The submissions by the parties

The plaintiff's submissions

The plaintiff submitted as follows by way of introduction: The plaintiff in the two cases before the court, Kenya Airports Authority is a body corporate created pursuant to the provisions of the Kenya Airports Authority Act, Chapter 395 Laws of Kenya. Section 4 of the Kenya Airports Authority Act provides that:

(1) Subject to subsection (2), the Minister may, by order published in the Gazette, transfer to the Authority any property belonging to the Government which appears to him to be necessary or useful to the Authority for the performance of its functions under this Act, which property shall vest in the Authority by virtue of the order without further assurance.

The plaintiff is a successor in title of the erstwhile Department of Aerodromes which was a department in the Office of the President. Pursuant to the provisions of section 4 (2) of the Kenya Airports Authority Act aforesaid, the Minister transferred all government property previously administered by the now erstwhile Department of Aerodromes, Office of the President, to the plaintiff through a Vesting Order known as the Kenya Airports Authority (Vesting) Order, 1994, ("the Vesting Order"). The Aerodromes (Control of Obstructions) Act of 1962, Chapter 396 Laws of Kenya sets out the schedule of properties previously managed by the Aerodromes Department that were transferred and vested in the plaintiff. L.R No. 21919 (the suit property) is part of the property that was vested in the plaintiff through the aforesaid Vesting Order.

Prior to the establishment of the plaintiff, all airports in Kenya fell under the control and management of the then Department of Aerodromes, Office of the President. The boundaries and dimensions of aerodromes were, in the absence of title deeds, defined by the Aerodromes (Control of Obstructions) Act. To get the exact extent and size of aerodromes, the dimensions of airports (aerodromes) stated in the aforesaid Act were taken into account together with all additional land that was from time to time acquired by the Government for purposes of expanding the said aerodromes. In the case of what was known as Nairobi Airport (now Jomo Kenyatta International Airport(JKIA)), the additional land was acquired through Gazette Notice No. 1105 of 26th April 1971(See pages 27 – 29 of the Plaintiff's Exhibit 2(a) produced in case 489 of 2004). The size of Nairobi Airport (now JKIA) as at the time of the Vesting Order aforesaid was therefore what is stated in the aforesaid Act together with all land acquired subsequently by the Government.

The effect of the said Vesting Order was in the case of land, to transfer and vest in the plaintiff land that was already in existence and whose dimensions were known even though at the time, as was customary with land owned by Government departments, no formal title had been issued in respect thereof. Consequently, in the case of JKIA, at the time of the Vesting Order, even though no title over the same had been acquired, the dimensions and extent thereof were known and the land was in existence. The import of Section 4 of the Kenya Airports Authority Act is that once land is vested in the plaintiff by the Government, the same vests in the plaintiff without further assurance and that the ownership of the land by the plaintiff is not dependent on the title issued by the Lands Office but is conferred by the Vesting Order.

In 1996 out of abundance of caution, the plaintiff caused a formal survey to be carried out on the land on which JKIA is situated and a Deed Plan and subsequently a title deed in respect thereof was issued. The land was given L.R. Number 21919(the suit property) that was issued with title No. I.R Number 70118(See pages 1 – 4 of Plaintiff's Exhibit 2(a) produced in case 489 of 2004). The Deed Plan Number 205580 for the suit property was issued on 21st May 1996 (See page 26 of Plaintiff's Exhibit 2(a) produced in case 489 of 2004) and the title on 26th July 1996 and registered on 13th August, 1996. The title for the suit property was never surrendered and as such the plaintiff did not assume the ownership of L.R. No. 24937 that was granted to it following the said surrender that aborted. The plaintiff's parcel of land on which JKIA is situated therefore remained L.R No. 21919, Title No. I.R 70118(the suit property). The pleadings were amended accordingly to reflect this position.

In cross examination and re-examination, PW1 explained how unscrupulous people with the intention of grabbing parts of the suit property had connived with the office of the Commissioner of Lands to order a re-survey to be done on the suit property purportedly with the intention of curving out Mombasa Road from the Deed Plan of the suit property. He stated that the said fraudsters organized for the surrender of the title for L.R. 21919 and in exchange therefor they purported to issue the plaintiff with another title for L.R. No. 24937 whose acreage was less than the one in the title for L.R No. 21919. Some conscientious officers at the Land Registry refused to participate in the fraudulent scheme and refused to sign and endorse the surrender that was embossed as entry 13 in the title for L.R. 21919.

Following that development, the title for L.R. No. 24937 was surrendered back to the Land Registry. The title was cancelled and is therefore no longer in existence. This explains why the plaintiff amended the complaints in the two cases herein in respect of the suit property to read L.R No. 21919 as opposed to the initial L.R No. 24937 whose title the plaintiff was holding at the time of filing these cases before the fraud was

discovered. The fact that the surrender of L.R. No. 21919 was not effected can be seen from its title (See page 4 of Plaintiff's Exhibit 2(a)) where there is an unsigned embossment, entry number 13 of a surrender to the Government of Kenya in exchange of New Grant I.R. 90243. The existence of unsigned entry on a title means that the contents of the embossment were not effected. This fact was confirmed by DW2 and DW3 during cross examination. The defendants' contention that the plaintiff holds two titles for the same parcel of land is therefore not true.

The plaintiff sued the defendants in HCCC 489 of 2004 and HCCC 206 of 2004 because they claimed a huge chunk of L.R No. 21919(the suit property). The defendants in both cases in collusion with officers at the Lands Office were purportedly allocated portions of the suit property as follows; L.R. No. 14231 in the case of the defendants in HCCC No. 489 of 2004; and L.R. No. 13512 in case of the defendants in HCCC No. 206 of 2004. The defendants in both cases have no valid claim over the suit property. They do not have any title to any part or portion of the properties that they are claiming and the documents that they rely upon to lay a claim to the suit property are fake and forgeries a fact that was confirmed by the Commissioner of Lands in a letter dated 30th December 2005(See page 8 of the Plaintiff's Exhibit 2 produced in case 489 of 2004). The plaintiff is the sole legitimate holder of a title for the suit property that measures four thousand six hundred and seventy-four decimal six nought (4,674.60) hectares or thereabouts (See page 1-4 of the Plaintiff's Exhibit 2 produced in case 489 of 2004).

On 24th October, 2004, the court ordered that ELCC No. 206 of 2004 and ELCC No. 489 of 2004 be tried together since the witnesses in the said cases were going to be the same. The order was not for consolidation but for the trial of the cases together and in that regard, each party had to produce evidence in respect of each case.

The plaintiff framed the following issues for determination by the court;

- a. Has the plaintiff proved its case as against the defendants in ELCC No. 206 of 2004 and ELCC No. 489 of 2004?
- b. Is the plaintiff entitled to the prayers sought against the defendants in ELCC No. 206 of 2004 and ELCC No. 489 of 2004?
- c. Did the plaintiff illegally evict the defendants from L.R. No. 21919 and demolish their houses?
- d. Do the defendants in ELCC No. 206 of 2004 and ELCC No. 489 of 2004 have any claim over all that parcel of land owned by the plaintiff and known as L.R No. 21919?
- e. Have the defendants in ELCC No. 206 of 2004 and ELCC No. 489 of 2004 proved any loss as a result of the said eviction, if at all there was an eviction?
- f. Who should bear the costs of the suit.

The plaintiff submitted that the defendants' contention that the plaintiff holds two titles for the same parcel of land is not true and as such there is no basis for the cancellation of the plaintiff's title to the suit property on the ground of the alleged existence of two titles. The plaintiffs submitted that the letters of allotment and title deeds on the basis of which the defendants in ELCC No. 489 of 2004 (Case No. 489 of 2004) and ELCC No. 206 of 2004 (Case No. 206 of 2004) are claiming part of the suit property were disowned by the Commissioner of Lands in a letter dated 30th December, 2005 to the plaintiff (See page 8 of plaintiff's exhibit 2 in Case No. 489 of 2004). The plaintiff submitted that in the said letter, the Commissioner of Lands stated categorically that the letter of allotment in respect of L.R. No. 14231 to Uungani and L.R. 13512 to Mulolongo were not genuine. The plaintiff submitted that the Title No. NRB/EMBAKASI/KATANI/LR13512 (See pages 11 to 15 of Plaintiff's exhibit 1) allegedly issued under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) by the Land Registrar in Nairobi is non-existent. The plaintiff submitted that that type of land reference was unknown under the provisions of the Registered Land Act and that explains why the Commissioner of Lands declared the allotment in respect of the parcel of land fake.

The plaintiff submitted that since Case No. 206 of 2004 and Case No. 489 of 2004 were not consolidated but were to be tried together, it was incumbent on the defendants in Case No. 206 of 2004 to adduce evidence in support of their case. The plaintiff submitted that no evidence was adduced by the defendants in Case No. 206 of 2004 in support of their case save for the filing witness statements. The plaintiff submitted that in the circumstances, the plaintiff's case as set out in respect of the land claimed by the defendants in Case No. 206 of 2004 is uncontroverted. The plaintiff submitted that the defendants did not dispute the averments by the plaintiff that they have no claim whatsoever in respect of the portion of the suit property that they (the defendants in Case No. 206 of 2004) are claiming.

The plaintiff submitted that despite filing very many witness statements, the defendants in Case No. 489 of 2004 called only four witnesses to testify. The plaintiff submitted that the evidence of DW1 had a lot of inconsistencies. The plaintiff submitted that the letter of allotment that DW1 relied on in his evidence in chief (See page 80 of Defendants' Exhibit 1) is dated 20th September 1996. It is for an Unsurveyed Agricultural Plot B, Athi River containing by measurement 449.9 hectares. The stand premium and other charges that were stated as payable in this letter of allotment were Kshs. 2,992,670/-. The acceptance of the said letter of offer was to be received by the Commissioner of Lands within thirty (30) days from 30th September 1996, that is by 30th October 1996. No such acceptance was produced in evidence.

The plaintiff submitted further that the letter of allotment produced by the defendants in Case No. 489 of 2004 in the List of Documents dated 17th December 2004 and filed on 17th December 2004 is dated 5th January 1998. It is addressed to the defendants and it is for an Unsurveyed Agricultural Plot B, Mavoko Municipality containing by measurement 449.9 hectares. The stand premium and other charges are Kshs. 3,167,370/-. The acceptance of this letter of allotment was due on or before 28th February 1998. No such acceptance was produced in evidence.

The plaintiff submitted that owing to the foregoing, the two letters of allotment had lapsed as a result of non-acceptance and payment of the stand premium. The plaintiff submitted that the defendants in Case No. 489 of 2004 according to the documents they produced in court, were the beneficiaries of two parcels of land, with the same acreage, one in Mavoko and the other in Athi River. The plaintiff submitted that on cross examination, DW1 was not able to say how this happened. His answer was only that the said letters of allotment referred to one and the

same parcel of land.

The plaintiff submitted further that in the undated letter of acceptance at page 79 of Defendants' Exhibit 1, the acceptance was in respect of a letter of allotment dated 24th January 2002. The plaintiff submitted that according to DW1, the correct letter of allotment was the one dated 20th September 1996, yet he could not show the court, when the same was accepted and payment in respect thereof made. The plaintiff submitted that the dates for the receipts for the payments made by the defendants relate to payments made in 2002 and they refer to an unsurveyed agricultural plot in Mavoko. See pages 73 to 78 of the Defendants' Exhibit 1.

The plaintiff submitted that in his evidence DW1 misapprehended the survey reports that were prepared and filed by the Director of Survey. According to his evidence, the said reports were a re-survey of the land owned by the plaintiff while a reading of the said reports (see pages 20 to 25 of Plaintiff's Exhibit 2) shows clearly that what the surveyor was doing was to establish where the beacons were and the reference data that was used to establish the position of the beacons.

The plaintiff submitted further that in his evidence regarding the eviction of the defendants, DW1 did not provide any evidence to show that it was the plaintiff which carried out the demolitions of the defendants' structures. The plaintiff submitted that the video clip that was played in court and which DW1 produced in proof of the defendants' claim did not at all prove that it was the plaintiff which carried out the evictions. The plaintiff submitted that the evidence that was adduced by the plaintiff's witnesses that the demolitions were carried out by the Government of Kenya pursuant to a cabinet decision was not controverted. The plaintiff submitted that in any event, DW1 did not prove that he had a house on the disputed land during the eviction and that the said house was demolished. The plaintiff submitted that DW1 did not also tender any evidence of the illnesses that he claimed to have suffered as a result of the said demolition.

The plaintiff submitted that Livingstone Kamande Gitau (DW2) purported to be an expert witness and attempted to analyse the two survey reports dated 29th October, 2004 and 3rd November 2009 that were filed in court by the Director of Surveys on 29th October, 2004 and 4th November, 2009 respectively. The plaintiff submitted that DW2 did not seem to understand and/or know why there were two reports and why one referred to L.R. No. 24937 and the other to L.R. No. 21919. The plaintiff submitted that on cross examination, DW2 confirmed that the surrender of L.R. 21919 was not registered and consequently, the Grant in respect of L.R. Number 21919 was still in existence.

The plaintiff submitted that the reasons why there were two survey reports can be captured from the order made by Kihara Kariuki J. on 23rd February, 2009. The plaintiff submitted that as at February, 2009, fraud that was perpetrated on the plaintiff's land had been discovered and the plaintiff had amended its pleadings to correct the land reference number from 24937 to 21919. The plaintiff submitted that this fact was not known to DW2 whose evidence proceeded as if there were two concurrent titles held by the plaintiff over the same parcel of land.

The plaintiff submitted that although DW2 claimed in his evidence in chief that the plaintiff encroached on private land namely, L.R. No. 14231, when he was referred to Gazette Notices Numbers 1105 and 1106 of 30th April 1971, he conceded, albeit reluctantly, that L.R. 3864 that gave rise to L.R. 14231 and L.R. No. 13512 could not validly give rise to the said parcels of land as it was compulsorily acquired by the Government for the airport and that, if L.R. 3864 was originally owned by a Mr. Douglas Watson and the Government had acquired only a part of it, the remainder portion namely, L.R. No. 3864/R would belong to Mr. Watson and would not be Government Land that was available for allocation.

With regard to the evidence of Gidraph Mutugi (DW3), the plaintiff submitted that he also gave evidence as an expert and produced a report entitled "Consolidated Report, Valuation and Claim for Compensation for Messrs. Ungani Settlement Scheme Self Help Group, (On Record) and Jumbo Community Self Help Group (One Other Interested Party) and their Shareholder, Claimants on L.R. 14231, Machakos County". The said report was produced as Defendants' Exhibit 2. The plaintiff submitted that although DW3 admitted in cross-examination that he was giving evidence as an expert, he also purported to also be a witness of fact by delving into the issue as to whether or not L.R. No. 3864 was validly acquired by the Government of Kenya pursuant to Gazette Notices Numbers 1105 and 1106 of 30th April 1971.

The plaintiff submitted that like DW2, DW3 admitted on cross examination that if L.R. No. 3864 originally belonged to one Douglas Watson and a part of it was acquired compulsorily by the Government, the remaining portion would still belong to Douglas Watson and would not be available for allocation by the Commissioner of Lands to a third party as it was not land that was free for allocation within the meaning of the Government Lands Act.

The plaintiff submitted that DW3's report had no probative value. The plaintiff submitted that DW3 did not visit the site of the demolition and as such his report was generated from a desk analysis. The plaintiff submitted that it is not possible to ascribe loss for land and other property that has not been visited. The plaintiff submitted that DW3's report was speculative and devoid of the expertise that DW 3 purported to have. The plaintiff submitted that further to the foregoing, DW3 was given a list of parcels of land that were allegedly taken by the plaintiff and that in his report, some of the parcels have no owners yet they are supposed to have suffered loss. The plaintiff submitted that the said report did not state; how many people had erected houses on the parcels of land that they occupied, the nature of the houses and the values of those houses. The plaintiff submitted that although DW3 told the court that he used the concept of relocation (where a person is forced to relocate to alternative premises as a result of an eviction) to calculate loss, he could not identify who amongst the list of persons contained in his report actually re-located. The plaintiff submitted that DW3 conceded that he did not use any comparable when arriving at the value of the land in his report and that he did not have sight of the titles for the plots that he valued. The plaintiff submitted that not having actually measured the land whose value he was giving makes DW3's report speculative and devoid of any probative value.

The plaintiff submitted further that in the report produced by DW3, he made reference to an entity known as Jumbo Community Self Help Group, which purported to have been joined as an Interested Party in these suits when the proceedings were closing. The plaintiff submitted that this group, not being an interested party or a party to the suit, has no stake in these suits and consequently, it was not necessary to comment on the losses allegedly suffered by group.

With regard to the evidence of Rose Anne Onyango (DW4), the plaintiff submitted that although the same was emotional, her evidence did not have any probative value. The plaintiff submitted that DW4 admitted that the houses that were demolished were very few since not many people had constructed houses on the disputed land which was a direct contradiction of the evidence of DW1 and DW3. The plaintiff

submitted that like DW1, DW4 did not prove that the demolition was carried out by the plaintiff. The plaintiff submitted further that DW4 did not also provide any evidence to show what loss she suffered and the kind of house that she had built which she alleged to have been demolished.

The plaintiff submitted that it had established that the title held by Mulolongo, the defendants in Case No. 206 of 2004 was fraudulent and that the allocation of the purported land to Mulolongo had been disowned by the Commissioner of Lands. The plaintiff submitted that the defendants in the said case cannot validly lay a claim to land on the basis of a title that is not known in law.

The plaintiff submitted further that it had also established that the purported letters of allotment on the strength of which the defendants in Case No. 489 of 2004 claimed a portion of the suit property were fraudulent. The plaintiff submitted that the defendants in Case No. 489 of 2004 placed before the court two letters of allotment with conflicting information and which they purported were for the same parcel of land. The plaintiff averred that according to the material placed before the court by the defendants in Case No. 489 of 2004, they were the beneficiaries of two parcels of land, with the same acreage, one in Mavoko and the other in Athi River. The plaintiff averred that the said pieces of land were said to be unsurveyed yet they were alleged to have emanated from L.R. No. 3864/R which was previously owned by one Douglas Watson. The plaintiff submitted that in their letter of acceptance of the purported allotment, the defendants in Case No. 489 of 2004 referred to yet another letter of allotment (See page 79 of Defendants' Exhibit 1) dated 24th January 2002. The plaintiff submitted that no such letter of allotment was produced by the defendants in evidence. The plaintiff submitted that all these contradictions pointed to a fraudulent scheme by the defendants to acquire land that was already acquired compulsorily for the JKIA and which was part of L.R. No. 21919.

The plaintiff reiterated that no evidence was called in respect of Case No. 206 of 2004 and as such the case presented by the plaintiff in Case No. 206 of 2004 was not controverted. The plaintiff submitted that since the defendants in the said case did not tender evidence, they did not prove any loss and consequently none should be awarded to them.

With regard to claim of loss in Case No. 489 of 2004, the plaintiff submitted that where the loss allegedly suffered is unique to each individual, each and every person alleging loss must prove the loss. The plaintiff submitted that no two losses can be the same. The plaintiff submitted that it was incumbent for each and every defendant alleging loss to prove; ownership of their parcels of land and loss of the land. The plaintiff submitted that loss of buildings, furniture and equipment is a special damage, which has to be specifically pleaded and proved. The plaintiff submitted that not only were these not pleaded, but they were also not specifically proved. The plaintiff submitted that in the circumstances, there can be no compensation for any buildings that were allegedly destroyed the existence of which were also not proved in the first place. The plaintiff submitted that there was also no proof that it was the plaintiff which carried out the demolition.

In support of the foregoing submissions, the plaintiff relied on Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR, where the court stated as follows:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes *Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 (ur)* appears in the Jivanji case:

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council vs Nakaye [1972] EA 446*, *Ouma v Nairobi City Council [1976] KLR 297* and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR)*. In the latest case, *Cockar JA* who dealt with the issue of special damages said in his judgment:

“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In *Ouma v Nairobi City Council [1976] KR 304* after stressing the need for a plaintiff in order to succeed on a claim for specified damages, *Chesoni J* quoted in support the following passage from *Bowen LJ's* judgment at 532-533 in *Ratcliffe v Evans [1892] QB 524*, an English leading case of pleading and proof of damage.

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

The plaintiff submitted that a significant portion of the evidence of DW1, DW 2 and DW3 was to the effect that the land that is claimed by the defendants is in Mavoko and not in Nairobi where L.R. No. 21919 is situated. The plaintiff submitted that this was an attempt to say that L.R. No. 21919 is illegal because it traverses two administrative regions, Mavoko and Nairobi. The plaintiff submitted that the registries for land falling under the Registration of Titles Act is either in Nairobi (Inland Registry) or in Mombasa (Coastal Registry). The plaintiff submitted that the land owned by the plaintiff falls under the Registration of Titles Act and hence the same was registered in the Inland Registry in Nairobi. The plaintiff submitted that the administrative districts of where the land falls are not relevant in registration under the Registration of Titles Act.

The plaintiff reiterated that pursuant to section 4 of the Kenya Airports Authority Act, a Vesting Order was issued that vested the suit property upon the plaintiff and that there was no need for further steps to vest title in the property upon the Plaintiff. The plaintiff submitted

that the plaintiff did not need a title deed to own all that parcel of land comprising Nairobi Airport (JKIA) whose dimensions were as stated in the Aerodromes (Control of Obstructions) Act and the subsequent land that was compulsorily acquired. The plaintiff submitted that the radical title of the plaintiff to its land emanated from the operation of law. Plaintiff reiterated that out of caution, it proceeded to survey and obtain a title to its land, which title is the Grant in respect of L.R. Number 21919 which was issued under the provisions of the Registration of Titles Act (now repealed).

The plaintiff cited section 23 of the Registration of Titles Act (now repealed) and submitted that it is the absolute and indefeasible owner of the suit property. The plaintiff cited Sarah Jelangat Siele v Attorney General & 3 others [2018] eKLR, in which the Court of Appeal quoted Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997, where the court stated that:

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

The plaintiff submitted that the defendants do not have any valid title to the land they claim which admittedly is part and parcel of L.R. No. 21919. The plaintiff submitted that the plaintiff's title over L.R. No. 21919 cannot be challenged on the grounds of fraud allegedly by the defendants namely, that the plaintiff has two titles for the same property which allegation holds no water.

In conclusion, the plaintiff submitted that it had proved its case to the required standard in both Case No. 206 of 2004 and Case No. 489 of 2004 and urged the court to grant the prayers sought in the two cases. The plaintiff submitted that it left the issue of general damages for trespass to the court's discretion. On the issue of costs, the plaintiff submitted that since the incidence of filing these cases was instigated by the continuous and illegal actions of the defendants, the costs should follow the event and the plaintiff should be awarded costs in both cases. The plaintiff submitted that the defendants in Case No. 489 of 2004 did not prove their counter-claim against the plaintiff and urged the court to dismiss the same with costs.

The defendants' submissions.

The defendants' submissions were made on behalf of Uungani Scheme Settlement Self Help Group(Uungani), Mulolongo Brothers Association (Mulolongo), Jumbo Community Self Help Group(Jumbo) and Mavico Settlement Self Help Group(Mavico). By way of introduction, the defendants submitted as follows: The two suits were filed by the plaintiff. The plaintiff knew the persons it was suing. This is clear from the persons upon whom the plaintiff intended to serve its pleadings. The plaintiff's suit was filed in respect of L.R. No. 24937, Grant I.R. No. 90243 measuring 4459.1 hectares. At the trial, the plaintiff denied that it had surrendered the original Grant Number I.R. No. 70118 for L.R. No. 21919. The true position of the matter is that the plaintiff brought the suits herein while in possession of the new Grant I.R. 90243, L.R for No. 24937 that was issued to it after effecting a surrender of the said original grant in accordance with recommendations that it had received from Messrs. Surv Plans Licensed Land Surveyors which the plaintiff had instructed to survey its land on 1st February, 2000(See Report filed by the plaintiff on 15th February, 2008 together with the Affidavit sworn by John Joseph Tito).

The defendants submitted that the findings by Messrs. Surv Plans Licensed Land Surveyors which were commissioned by the plaintiff and the Director of Surveys who carried out survey pursuant to the order that was issued by the court were unanimous that; the plaintiff's land had encroached on private land that had been surveyed earlier and that it was necessary for the area of the plaintiff's land to be regularized by removing all the private properties from it. The defendants submitted that the dispute between the plaintiff and the defendants was a boundary dispute and that the same was resolved through a survey that was conducted by the Director of Surveys to which none of the parties raised an objection. The defendants submitted that the amendment of the plaint by the plaintiff that introduced L.R. No. 21919 was mischievous and that the same was a ploy to prolong the case that had already been resolved. The defendants submitted that there was no way L.R. No. 21919 could be replaced by L.R. No. 24937 which was a latter registration.

The defendants submitted that following this development, another survey to be conducted by the Director of Surveys was ordered by the court. The survey was conducted and a report dated 3rd November, 2011 which concurred with the findings in the earlier survey reports was filed in court. The defendants submitted that on this basis alone the plaintiff's suit ought to be dismissed.

In their submissions on the other issues in case the case is not dismissed on the foregoing grounds, the defendants submitted that the plaintiff had a duty to prove that the titles and the letters of allotment that were held by the defendants in respect of the parcels of land that they were claiming were fake. The defendants submitted that in respect of L.R. No. 14231/1 and L.R. No. 14231/2 they only had letters of allotment and that the only title that they held was in respect of L.R. No. 13512 that was registered as Grant I.R. No. 58266. The defendants submitted that this title was older than the plaintiff's title for L.R. 21919. The defendants submitted that there was no evidence on record showing that the said letters of allotment were forgeries. In support of this submission, the defendants cited Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR and Dr. Joseph N.K. Arap Ng'ok v Justice Moiwo ole Keiwua & 4 Others, Civil Application No. NAI.60 of 1997 (unreported). The defendants submitted that under section 23(1) of the Registration of Titles Act, Chapter 281 Laws of Kenya, a title can only be challenged if it has been obtained by fraud.

The defendants submitted that the letters of allotment held by them could only be challenged legally if found to have been obtained by way of fraud which the plaintiff had failed to prove. The defendants submitted that to establish fraud against the defendants in respect of the said letters of allotment, the plaintiff had to prove that L.R. No. 21919 was compulsorily acquired by the Government of Kenya in 1971. The defendants submitted that L.R. No. 21919 was not in existence in 1971 and as such the same could not have been acquired through compulsory acquisition.

The defendants submitted further that the plaintiff failed to prove that the parcels of land claimed by the defendants formed part of L.R. No. 21919. The defendants submitted that the parcels of land claimed by the defendants were distinct and separate from the plaintiff's land a fact that was confirmed by the various survey reports filed in court and the evidence of DW2 and DW3. The defendants submitted further that the

plaintiff did not produce any evidence showing that the land claimed by the defendants was vested upon the plaintiff in 1994 through a Vesting Order in the Kenya Gazette. The defendants submitted that the plaintiff did not produce any Gazette Notice evidencing the alleged compulsory acquisition of the defendants' parcels of land namely, L.R. No. 14231/1, L.R. No. 14231/2 and L.R. No. 13512.

The defendants submitted that even if it was assumed that the plaintiff's title in respect of L. R No. 21919 was issued on 1st August, 1996, it had been demonstrated by the defendants through various survey reports that the said parcel of land had encroached on several private properties. The defendants submitted that since the plaintiff has encroached on the defendants' parcels of land, its case should be dismissed. In support of this submission, the defendants cited Johnson Wachira Musa v Nyeri County Council & another [2009] eKLR and Rahab Mumbi Kimani v Damaris Wanjiku Gachoka [2018] eKLR.

The defendants submitted that they applied for their respective parcels of land, their applications were considered favourably, they were allocated the said parcels of land, they accepted the allotment and paid the requisite fees. The defendants averred that upon accepting the allotment and making the necessary payment, a binding contract was entered into between the defendants and the Commissioner of Lands which was to be performed by the Commissioner Lands by issuing a grant to them. The defendants submitted that the said parcels of land ceased to be public land. The defendants submitted that the plaintiff did not produce any evidence showing that it owned L.R No. 14231/1, L.R 14231/2 and L. R. NO.13512.

The defendants submitted that the plaintiff's act of demolishing the defendants' structures that were on L.R No. 14231/1, L.R No. 14231/2 and L.R No.13512 on 12 and 13th November, 2011 was illegal. The defendants submitted that the said demolition contravened a consent order of status quo that was made on 14th July, 2004 that required the parties to maintain the status quo pending further orders of the court.

The defendants submitted that they had demonstrated that the plaintiff held land on which JKIA is situated under two different titles that bore different acreages and lease terms in unexplained circumstances contrary to the law. The defendants submitted that this state of affairs amounted to fraud. The defendants submitted that the plaintiff colluded with the commissioner of lands in an elaborate scheme to fraudulently alienate the defendants' parcels of land namely; L.R No. 14231/1, L.R 14231/2 and L. R NO.13512 (hereinafter together referred to as "the defendants' land"). The defendants submitted that they had demonstrated through video clips that the demolition of the structures that were on the defendants' land was undertaken by the plaintiff and its agents. The defendants submitted that the said demolition was illegal. In support of this submission, the defendants relied on Moi Education Centre Co. Ltd v William Musembi & 16 others [2017] eKLR. The defendants submitted that the court held in that case that forced eviction without a court order was a violation of a right to inherent human dignity, security of the person, fundamental rights of children guaranteed by Article 53 of the constitution, rights of elderly persons guaranteed by Article 57 of the constitution read together with Articles 40 and 43 of the constitution. The defendants also cited the cases of Gusii Mwalimu Investment Co. Ltd & 2 others v Mwalimu Hotel Kisii Ltd, Civil Appeal No. 160 of 1995 cited in Teresia Irungu v Jackton Ocharo & 2 others [2013] eKLR where the court stated that unless a tenant consents or agrees to give up possession, a landlord has to obtain an order of a competent court or a statutory tribunal to obtain an order for possession. The defendants submitted that the structures that were on the defendants' land were demolished and the defendants evicted contemptuously in defiance of a court order. The defendants submitted that the notices that were purported to have been issued by the plaintiff to the defendants were addressed to strangers. The defendants submitted that the court declined to join the National Land Commission to this suit on the ground that this was a boundary dispute.

The defendants submitted that they had been in occupation of L.R No. 14231/1 and L.R. No. 14231/2 from 1996 and 1998 respectively and L.R No. 13512 from 1986. The defendants submitted that JKIA being a security area, there was no way in which the defendants could have gained entry into the same and remained therein for over 18 years without being noticed. The defendants submitted that their structures on the defendants' land were demolished by the plaintiff without notice on the weekend of 12th and 13th November, 2011 for material gain to the detriment of the defendants while the dispute was before the court and an order of status quo was subsisting.

The defendants submitted that they were at all material times within the confines of their own parcels of land that were granted to them by the Government through bona fide letters of allotment dated 20th September, 1996 and 1st January, 1998 respectively. The defendants submitted that the two surveys that were carried out by the Director of Surveys on the orders of the court confirmed the existence of the plaintiff's land and the defendants' land on the ground.

The defendants submitted that instead of conducting its activities within the boundaries of its parcels of land and living peacefully with its neighbours, the plaintiff engaged in the despicable, disgraceful, gruesome and scandalous destruction of the defendants' houses and other developments on L.R No.14231 and L.R No. 13512. The defendants submitted that the plaintiff thereafter evicted the defendants from their land and erected a strong fence to keep the defendants out.

The defendants submitted that in proof of their claim to L.R No.14231, the defendants produced in court several maps (See Defence exhibit 1 pages 21-31). The defendants submitted that Map No. 1 dated 7th March, 1931 (Page 21 of Defence Exhibit 1) shows the original parcel of land then known as L.R No.3864 that was subsequently subdivided to give rise to among others the defendants' parcels of land; L.R No.14231/1 & 2 and L.R No. 13512. The map shows that the land was within the locality East of Embakasi Township.

The defendants submitted that Map No. 2 that was authenticated by the Director of Surveys on 26th August, 1977(Page 22 of Defence Exhibit 1) shows the first subdivision of L.R No.3864. This first subdivision gave rise to L.R No.9042/57 and L.R No.9042/56 which were set aside and granted to the Aerodromes Department then in the Office of the President for their use.

The defendants submitted that Map No. 3A revised in 1991(Page 23 of Defence Exhibit 1) with a heading "JOMO KENYATTA INTERNATIONAL AIRPORT(JKIA)" was prepared by the Aerodromes Department and not by the Director of Surveys of Kenya. The map gives the measurement of JKIA as 5098 hectares. The defendants submitted that the purpose of this map was to show the boundaries of JKIA. The map shows the land that was meant for "Future Runway" and "Noise Buffer Zone".

The defendants submitted that Map No. 3B revised in 1994 (Page 24 of Defence Exhibit 1) also had a heading, "JOMO KENYATTA

INTERNATIONAL AIRPORT". The defendants submitted that this map also originated from the plaintiff and not from the Director of Surveys. The defendants submitted that in this map, the measurement of JKIA decreased from 5098 hectares to 4660 Hectares. The map like the previous one shows "Future Runway" and "Noise Buffer Zone". The defendants submitted that this map also shows the existence of L.R. No.3864/R (the remainder of L.R. No. 3864) that upon subdivision gave rise to the defendants' parcels of land. The defendants submitted that L.R No. 13512 could also be seen on the map. The purpose of this map was also to show JKIA boundary.

The defendants submitted that Map No. 4 that was authenticated by the Director of Surveys on 31st August, 1987 (Page 25 of Defence Exhibit 1) shows the survey and subdivision of L.R. No.3864/R. This map the defendants submitted shows the creation of L.R. No. 14231 owned by the defendants. The defendants submitted that according to the map, the said parcel of land was within Registration District of Machakos adjacent to the City of Nairobi (East) and measures 649.9 hectares.

The defendants submitted that Map No. 5 that was approved and authenticated by the Director of Surveys on 31st August, 1987(Page 26 of Defence Exhibit 1) shows a survey of L.R. No.14231 that was subdivided into L.R No. 14231/1 and L.R No.14231/2 owned by the defendants. The defendants submitted that Map No. 6 dated 19th March, 2008 (Page 27 of Defence Exhibit 1) is a Deed Plan No. 285225 for L.R No. 14231/1 measuring 449.9 hectares prepared by the Director of Survey. The defendants submitted that the Deed Plan also shows that the land is within the District of Machakos and falls under the administrative locality of Mavoko Municipality.

The defendants submitted that Map No. 7 (Page 28 of Defence Exhibit 1) has a heading, "NAIROBI AND ITS ENVIRONS" and shows the demarcation of the boundary between Nairobi County and Machakos County. The defendants submitted that the map shows that the plaintiff's land has on it JKIA and is within the City of Nairobi. The defendants submitted that this map also shows that the defendants' parcels of land namely, L.R No.14231/1 and L.R No. 14231/R (as it was then before allotment to create L.R. No.14231/2) and L.R No.13512 were far away from JKIA flight Path that was within the plaintiff's parcel of land situated in the City of Nairobi.

The defendants submitted that Map No. 8A (Page 29 of Defence Exhibit 1) has a heading "NAIROBI COUNTY PUBLIC PRIMARY AND SECONDARY SCHOOLS" and that its purpose was to show that the boundary of the City of Nairobi was not altered even after the promulgation of the Constitution of Kenya 2010. The defendants submitted that Map No. 8B dated 18th April, 2011(Page 30 of Defence Exhibit 1) was drawn on behalf of the City Council of Nairobi and that it shows that JKIA which is on the plaintiff's land marked 20H which is within the boundary of Nairobi County is far away from defendants parcels of land; L.R No.14231 and L.R No.13512. The defendants submitted further that it is also clear from this Map that there is a Noise Buffer Zone in between the plaintiff's land and the defendants' land identified as L.R No. 9042/56.

The defendants submitted that Map No. 8C (Page 31 of Defence Exhibit 1) with a heading "NAIROBI & ENVIRONS" was prepared by the Director of Surveys and it illustrates the boundary of Nairobi Area before L.R No. 3864 was compulsorily acquired by the Government of Kenya in 1971. The defendants submitted that the boundary of Nairobi Area has never been altered. The defendants submitted that it was illegal, corrupt and unlawful for the plaintiff to grab the defendants land that was far from its land and in the process render thousands of Kenyans homeless and destitute. The defendants submitted that the plaintiff did not know the actual size of its land.

The defendants submitted that, the plaintiff's Grant I.R. No. 90243 for L.R. No.24937 shows that the plaintiff's land measures 4,459.1 hectares; the plaintiff's Grant I.R. No. 70118 for L.R. No.21919 shows that the plaintiff's land measures 4,674.60 Hectares; the plaintiff's Map No. 3A shows that the plaintiff's land measures 5,098 hectares and the plaintiff's Map No. 3B shows that the plaintiff's land measures 4,660 Hectares.

The defendants submitted that the confusion and conflicts regarding the size of JKIA had been brought about by the plaintiff's mistaken belief that a declaration of land as forming part of an aerodrome pursuant to the Aerodromes (Control of Obstructions) Act Chapter 396 Laws of Kenya conferred upon the plaintiff title upon such land. The defendants submitted that such declaration could not confer title to land. The defendants submitted that Aerodromes (Control of Obstructions) Act Chapter 396 Laws of Kenya does not confer title to land but only permits restriction and control of heights of obstacles beyond a certain level as directed by the relevant Minister.

The defendants submitted that upon compulsory acquisition of L.R. No. 3864 in 1971 among many others, all the acquired land vested in the Government and was placed in the National Land Bank. The defendants submitted that in 1977, a portion of L.R. No. 3864 was curved out and alienated in favour of the plaintiff which upon survey became, L.R No. 9042/56 and L.R No.9042/57. The defendants submitted that the balance of the acquired land was indicated as L.R No. 3864/R and is shown in various survey maps as L.R No. 3864/R /GL. The defendants submitted that this L.R No. 3864/R was similarly allocated to other deserving Kenyans the defendants being some of them.

The defendants submitted that the first letter of allotment that was issued to them was dated 1st September, 1996 (Defence Exhibit 1) in which the amount payable was Kshs. 2,992,670/=. The defendants submitted that on recalculation, that amount was enhanced upwards to Kshs. 3,167, 370/= after which a subsequent letter of allotment dated 9th January, 1998 was issued and the said amount paid.

The defendants submitted that the plaintiff did not produce any evidence to show how it took back Grant I.R. 70118 for L.R.21919 that it had surrendered on being issued with Grant I.R. 90243 for L.R. 24937. The defendants submitted that there was no evidence before the court showing a re-surrender of Grant I.R. 90243 for L.R. 24937. The defendants submitted that there was no document or payment receipt evidencing the payment for the surrender. The defendants submitted that the plaintiff did not explain from where it got the extra acreage which increased the size of its land from 4459.1 hectares as per Grant I.R No. 90243 for L.R No. 24937 to the new size of 4674.60 hectares as per Grant I.R No. 70118 for L.R. No. 21919 that resurfaced miraculously.

On the issue of notice, defendants submitted that the plaintiff did not follow the mandatory provisions of sections 14, 15 and 16 of the Kenya Airports Authority Act Chapter 395 Laws of Kenya that requires the plaintiff to serve a notice prior to an eviction. The defendants submitted that the notices that were produced in evidence were addressed to the residents of Syokimau, Kyangombe Village and Mitumba Village who are strangers to this suit.

The defendants submitted that none of the notices was served upon or addressed to the Defendants. The defendants submitted that the notices that were issued by the plaintiff in 2009, 2010 and 2011 were an afterthought and were intended to hoodwink the court because they were issued during the pendency of this suit against the defendants.

The defendants submitted that David Wambua Mila (DW1) gave evidence on his own behalf and in a representative capacity on behalf of the other defendants and all the interested parties. The defendants submitted that the gist of DW1's evidence was that the developments destroyed by the plaintiff on 12th and 13th November, 2011 and the parcels of land from which the defendants were evicted rightfully belonged to defendants. The defendants submitted that from the evidence of DW1, the defendants were evicted from their residences in Mavoko Sub-County, Machakos County in an area called Uungani Settlement Scheme and known locally as "Kwa Ndangi" which comprises of the parcels of land owned by Uungani Settlement Scheme Self Help Group, Jumbo Community Self Help Group and Mulolongo Brothers Association. The Defendants submitted that Uungani Settlement Scheme was part of L.R. No. 3864 that was owned by a settler called Douglas Watson.

On the consequences of demolition upon the defendants, the defendants submitted that their names were tarnished, they suffered from stress and many have since died. The defendants submitted that many of them developed hypertension, diabetes and depression and were forced to incur unwarranted expenditure which occasioned them financial loss. The defendants submitted that DW1 lost friends because people did not want to be associated with someone who had been labelled a fraudster. The defendants submitted that DW1 was forced to relocate his dwelling house with the consequence that he had to pay rent. DW1's children were also forced to repeat classes. The defendants submitted that DW1 suffered from high blood pressure, diabetes and impotency. The defendants submitted that even the children were not spared. They also suffered from stress. The defendants submitted that they also lost churches and schools and that their children took very long to get alternative schools.

The defendants submitted that the scope of LIVINGSTONE K. GITAU's (DW2) engagement was to investigate the creation of the boundary between the plaintiff's Land, L.R 21919 and the defendants Land, L.R 14231/1. The defendants submitted that this investigation was necessary because the plaintiff had upon an amendment to the plaint changed/replaced the title of its JKIA land from Grant I.R No. 90243, L.R. 24937 within Nairobi County (measuring 4459.1 Hectares) to an earlier Grant I.R No. 70118, L.R. 21919 within Nairobi County (measuring 4674.60 Hectares).

The defendants submitted that DW2's investigations revealed that the plaintiff had surrendered L.R. No. 21919 because the records at the Director of Surveys of Kenya revealed that the Director of Surveys had undertaken a resurvey of JKIA land and had issued a new land reference number and deed plan for the said land, L.R. No. 24937. The defendants submitted that Grant I.R. No. 90243 for L.R. No. 24937 shows on its face that it was issued following surrender of Grant I.R No. 70118 for L.R No. 21919.

The defendants submitted that after his investigations, DW2 made the following findings; L.R No. 3864 was created in 1931 through a compilation from Plan Numbers 30133 and 30243. In 1977, L.R No. 9042/56 was exercised from L.R No. 3864 and alienated to the Aerodromes Department for their purposes. What remained was L.R No. 3864/R. Another parcel of land L.R No. 13512 was exercised from L.R No. 3864/R through F/R 182/26. L.R No. 13512 was allocated to Mulolongo and they were issued with a title in 1986. On 15th September, 1996, Uungani was allocated Plot No. Mavoko B within L.R No. 14231 while Jumbo was allocated Plot No. Mavoko A also within L.R No. 14231 on 5th January, 1998. In 1998, L.R No. 14231 was subdivided by the Commissioner of Lands into two portions L.R. No. 14231/1 and L.R. No.14231/2. On 25th March, 2008, after a survey of L.R. No. 14231/1, Deed Plan No. 285225 was produced and sent to the Commissioner of Lands. Uungani thereafter went ahead to sub-divide its land, L.R No. 14231/1 to its shareholders, using a Part Development Plan(PDP) which had been prepared in consultation with Mavoko Municipal Council. The defendants submitted that from the foregoing, L.R. No. 14231/1 was procedurally and legally allocated to Uungani. The defendants submitted that the said parcel of land was now private land and that if the Government was interested in the same, it could acquire the same through purchase or compulsory acquisition. The defendants submitted that a private surveyor appointed by the plaintiff and a Government Surveyor who carried survey following a court order concurred with the findings of DW2.

The defendants submitted that G. K. MUTUGI, DW3 was also an expert witness who carried out investigations on the land in dispute. The defendants submitted that from his investigations DW3 discovered that Uungani and Jumbo held their parcels of land on the basis of letters of allotments while Mulolongo had a valid title for its land. The defendants submitted that DW3 as an expert valuer computed the compensation due to the defendants and submitted a report and valuation as evidence. The defendants submitted that the form of compensation that was proposed by DW3 in his report is the market value for the period of eight (8) years that the plaintiff had illegally occupied the defendants' land. They submitted that there was also a computation for loss and consequential costs incurred by the defendants in seeking alternative settlement. The defendants submitted that the compensation proposed in DW3's report was not an exhaustive restitution of damages as it does not relate to general damages, specific special damages, aggravated and exemplary damages, mesne profits and such other compensatory factors that shall be demanded after the court has made a finding that the plaintiff's actions were illegal, unlawful and malicious.

The defendants submitted that from the evidence of ROSE ANNE ONYANGO(DW4), the court should make the following findings;

- i. The defendants' livelihoods were grossly infringed upon.
- ii. The defendants developed many diseases like hypertension, impotency for men, diminished sexual desire for women, heart attacks, diabetes, mental sickness, psychological depression and acute alcoholism.
- iii. Children stopped schooling.
- iv. Banks auctioned properties of the defendants who had defaulted in the payment of home development loans thereby making some defendants poorer.

v. Some of the defendants committed suicide.

vi. Some of the defendants lost their lives from illnesses attributed to the demolitions/evictions.

vii. Many solid marriages broke and partners separated.

viii. Many of the defendants became homeless and majority are homeless to date.

ix. Many of the defendants became destitute, lost hope of ever being able to recoup the financial drain/ loss and the time wasted to date.

The defendants submitted that an award be made to the defendants as follows;

a) UUNGANI	Kshs. 19,003, 750, 000/=
b) JUMBO	Kshs. 8,767, 600, 000/=
GRAND TOTAL	Kshs. 27,771, 150, 000/=

The defendants urged the court to dismiss the plaintiff's suit with costs and the plaintiffs be ordered to vacate L.R No 14231/1, L.R No. 14231/2 and L.R No. 13512. The defendants submitted that ELCC No. 206 of 2004 in which L.R No. 13512 is claimed was consolidated with ELCC No. 489 of 2004. The defendants urged the court also to order the plaintiff to allow the defendants to return to and settle on their parcels of land; L.R. No. 14231/1, L.R. No. 14231/2 and L.R. No. 13512. The defendants submitted further that the Commissioner of Lands be directed to complete the preparation and issuance of the new grants in respect of L.R. No. 14231/1 and L.R. No. 14231/2 in favour of Uungani and Jumbo respectively.

The defendants submitted that they were entitled to compensation for the eight (8) years that the plaintiff has illegally occupied their parcels of land. The defendants submitted further that since no alternative settlement was offered to the defendants after their eviction, they were also entitled to the expenses incurred in relocation. The defendants submitted that the compensation payable to them attracts an additional statutory increment of 15% in accordance with the Land Acquisition Act, Chapter 295 Laws of Kenya (now repealed). The defendants submitted that they were also entitled to valuation fees that they incurred amounting to Kshs 288,547,680.00 inclusive of V.A.T @16%.

The defendants submitted that by the time they were illegally and unlawfully evicted from their parcels of land, they had already developed standard infrastructure on the said parcels of land. The defendants submitted that they are entitled to be compensated for the said infrastructure as part of the restitution sought by them in their counter-claim so that the said parcels of land can be restored to the state in which they were before their eviction. The defendants submitted that they are entitled to a total sum of Kshs. 612,031,800.00 for infrastructure restoration made up as follows;

(a) Roads;

Roads for Uungani	Kshs. 82,500,000.00
Roads for Jumbo	Kshs.39, 000,000.00
Roads for Mulolongo	Kshs. 27,000,000.00
Total	Kshs148, 500,000.00

(b) Water reticulation;

For Uungani	Kshs. 187,640,000.00
For Jumbo	Kshs. 93,480,000.00
For Mulolongo	Kshs. 67,464,000.00
Total	Kshs 348,552,000.00

(c) Electricity supply;

Uungani	Kshs. 35,670,000.00
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Jumbo	Kshs. 49,641,300.00
Mulolongo	Kshs. 29,668,500.00
Total	Kshs. 114,979,800.00

(d) Planning and Survey fees;

Uungani	Kshs. 635,974,930.00
Jumbo	Kshs. 335,429,660.00
Mulolongo	Kshs. 128,898,810.00
Total	Kshs 1,100,393,400.00

The defendants submitted that the quantum of the compensation payable for infrastructure developments was arrived at in consultation with consultant engineers whose reports are annexed to the submissions. The defendants submitted that the said claims qualify as restitution sought in the defendants' defence and counterclaim. The defendants submitted that the claim is supported by the evidence of DW1 and DW4 who testified that the defendants' parcels of land were developed as at the time of the defendants' eviction and that roads, water and electricity were connected. The defendants referred the court to the various video clips played in open court by DW1.

On damages, the defendants submitted that they were entitled to damages under the following heads;

(a) Part of the special damages specific to land.

The defendants submitted that they are entitled to an award of KShs. 27,719, 600,000/= under this head for the illegal and unlawful grabbing of their land by the plaintiff after destroying their developments. The defendants submitted that this payment will restore them to the status in which they were before their forceful eviction by the plaintiff.

(b) General damages.

The defendants submitted that they are entitled to general damages to be assessed by the court.

(c) Aggravated damages and exemplary Damages.

The defendants submitted that the plaintiff should be ordered to pay aggravated and exemplary damages as they invaded and demolished the defendants' structures without notice during the subsistence of a valid court order in the most inhumane manner. The defendants submitted that the plaintiff should be punished commensurate with its illegal actions.

(d) Mesne profits/future earnings.

The defendants submitted that they were entitled to anticipated rental income from their parcels of land from 12th and 13th November, 2011 until the date of judgment herein.

(e) Costs.

The defendants submitted that they were entitled to the costs of expert witnesses together with the costs of the suit and interest computed from the date of filing suit.

In support of their submissions on damages, the defendants relied on; Caroget Investment Limited v Aster Holdings Limited & 4 others [2019] eKLR, on illegal use and occupation of land, Titus Gatitu Njau v Municipal Council of Eldoret [2015] eKLR on exemplary damages, George Kimani Mbugua & 2 others v Ministry of Roads & another [2013] eKLR on compensation for violent removal of illegal occupants of land and Mike Maina Kamau v Attorney General [2017] eKLR on damages.

The defendants invited the court to take judicial notice of the following;

1. The plaintiff came to court claiming ownership of L.R. No. 24937 which the plaintiff later amended to L.R. No. 21919.
2. The defendants by themselves, their servants, agents, or anyone person claiming through the defendants have never advertised for sale, interfered with, alienated, sub-divided or trespassed upon all that parcel of land known as L.R. No. 21919 or any part of it (formerly described as L.R. No. 24973).

3. The defendants always owned and occupied L.R. No. 14231/1, L.R. No. 14231/2 and L.R. No. 13512 respectively.
4. The plaintiffs attempted to derail the expeditions conclusion of the suit.
5. Through a complaint lodged on 11th December, 2018, the plaintiff maliciously, clandestinely and injudiciously attempted to have the titles held by the defendants nullified by the National Land Commission while this suit was pending.
6. The observations, findings and recommendations made by Hon. Mutava Musyimi Commission.

The defendants submitted that they had discharged the burden of proof by proving beyond a balance of probabilities that at no time was the wanton and illegal acts of demolition, destruction and occupation of the defendants' land by the plaintiff sanctioned by law and in particular there was a breach of the status quo order. The defendants submitted that the plaintiff had failed to prove its case on a balance of probabilities. The defendants urged the court to dismiss the plaintiff's suit with costs to the defendants and to enter judgement for the defendants as prayed in the counter-claim together with costs and interest.

The issues for determination by the Court.

The parties did not agree on issues for determination by the court. From the pleadings the following in my view are the issues arising for determination in the two cases before the court that were heard together;

1. Whether the plaintiff is the owner of all that parcel of land known as L.R No. 21919 measuring 4,674.60 hectares or thereabouts (the suit property).
2. Whether L.R No. 14231 claimed by Uungani and L.R No. 13512 also known as NBI /EMBAKASI/ KATANI/LR13512 claimed by Mulolongo are within the boundaries of the suit property.
3. Whether the allocation of L.R No. 14231 to Uungani was lawful.
4. Whether the allocation and issuance of a title to Mulolongo in respect of L.R No. 13512 also known as NBI/EMBAKASI/KATANI/LR13512 was lawful.
5. Whether the defendants in the two suits trespassed on the suit property.
6. Whether the defendants in ELCC No. 489 of 2004 were illegally evicted from L.R No. 14231 by the Plaintiff.
7. Whether the defendants in ELCC No. 489 of 2004 suffered any loss as a result of the said eviction.
8. Whether the plaintiff is entitled to the reliefs sought in ELCC No. 206 of 2004.
9. Whether the plaintiff is entitled to the reliefs sought in ELCC No. 489 of 2004.
10. Whether the defendants in ELCC No. 489 of 2004 are entitled to the reliefs sought in their counter-claim.
11. Whether the defendants in ELCC No. 206 of 2004 are entitled to any relief
12. Whether the interested parties namely, Jumbo Community Self Help Group and Mavicor Self Help Group are entitled to any relief.
13. Who is liable for the costs of the two suits?

Whether the plaintiff is the owner of all that parcel of land known as L.R No. 21919 measuring 4,674.60 hectares or thereabouts (the suit property).

The plaintiff produced in evidence a copy of Grant No. I.R 70118 dated 26th July, 1996 in respect of L.R No. 21919(the suit property). To the said Grant was annexed a Deed Plan No. 205580 dated 21st May, 1996. According to the said Grant, the suit property measures 4674 .60 hectares. According to the entries in this Grant, there was an attempt to surrender the same to the Government on 7th November, 2002 in exchange with a new Grant No. I.R 90243. That surrender was however not endorsed by the Land Registrar/Registrar of Titles. Grant No. I.R 70118 dated 26th July, 1996 in respect of L.R No. 21919 was therefore not surrendered. The defendants had contended that Grant No. I.R 70118 dated 26th July, 1996 in respect of L.R No. 21919 was surrendered in exchange with Grant No. I.R 90243 for L.R No. 24937.

Grant No. I.R 90243 for L.R No. 24937 was indeed issued to the plaintiff. According to a copy of that Grant that was produced by the defendants in evidence, Grant No. I.R 90243 for L.R No. 24937 was issued on 16th January, 2003 and registered on 18th January, 2002(sic). According to the preamble to the Grant, the same was issued in pursuance of a Surrender registered as I.R No. 70118/19. According to this new grant, the measurement of the plaintiff's land was reduced from 4674 .60 hectares to 4459.1 hectares. The plaintiff disowned this new Grant. The plaintiff contended that after the 1996 survey of the plaintiff's land that gave rise to Grant No. I.R 70118 for L.R No. 21919, the Commissioner of Lands observed that the plaintiff had included Mombasa Road in L.R No. 21919. The Commissioner of Lands requested

the plaintiff to carry out a resurvey of L.R No. 21919 to excise Mombasa Road from its land. This request was made at the height of land grabbing in the country and the plaintiff's land was not spared. It is this resurvey that gave rise to Grant No. I.R 90243 for L.R No. 24937. The plaintiff contended that it lost a lot of its land to land grabbers during this resurvey. The plaintiff contended that due to this loss, the new Grant No. I.R 90243 for L.R No. 24937 was cancelled and the plaintiff reverted to its old title, Grant No. I.R 70118 for L.R No. 21919.

The defendants argued at length that there was no evidence of surrender or cancellation of Grant No. I.R 90243 for L.R No. 24937. My view on this matter is that before the new Grant No. I.R 90243 for L.R No. 24937 was issued to the plaintiff, the earlier Grant No. I.R 70118 for L.R No. 21919 had to be surrendered. As I have mentioned earlier, there was an attempt to surrender Grant No. Grant No. I.R 90243 for L.R No. 24937. That surrender however aborted when the registration of the surrender against the title of L.R No. 21919 was not endorsed by the Registrar of Titles. In the circumstances, I am of the view that Grant No. I.R 90243 for L.R No. 24937 was issued prematurely. It is therefore my finding that the only valid title held by the plaintiff is Grant No. I.R 70118 for L.R No. 21919. It follows therefore that the plaintiff is the lawful owner of L.R No. 21919(the suit property).

Whether L.R No. 14231 claimed by Uungani and L.R No. 13512 also known as NBI /EMBAKASI/ KATANI/LR13512 claimed by Mulolongo are within the boundaries of the suit property.

I have perused the many survey reports that were produced in evidence on the origin of L.R. No. 14231 claimed by Uungani and L.R No. 13512 claimed by Mulolongo. It is common ground that the two parcels of land originated from L.R No. 3864. It is also common ground that L.R No. 3864 was compulsorily acquired by the Government in 1971 for "Nairobi Airport Development". It is also common ground that Nairobi Airport is what is now referred to as Jomo Kenyatta International Airport(JKIA) which is run and managed by the plaintiff. It is common ground that until 1996, the plaintiff did not have a title for the land in which JKIA is situated which included part of L.R No. 3864 that had been acquired for the development of JKIA. When the plaintiff carried out a survey of JKIA land in 1996, it is apparent from the evidence on record that other surveys had been done whose purpose was to alienate portions of the said L.R No. 3864 although the intended beneficiaries are not clear from the material on record. It is also clear that despite the said surveys having been done no allotments were immediately done nor titles issued to the intended beneficiaries. No part development plans were placed before the court to show the purpose for which portions of the said L.R No. 3864 that was acquired by the Government for the development of JKIA were being alienated for. From the evidence on record, it appears that as at the time the plaintiff carried out a survey of JKIA land in 1996, the surveys giving rise to L.R. No. 14231 claimed by Uungani and L.R No. 13512 claimed by Mulolongo had been done. During its survey, the plaintiff surveyed all land including L.R. No. 14231 and L.R No. 13512 that had been carved out through the earlier surveys aforesaid. It follows therefore that L.R. No. 14231 and L.R No. 13512 are within the boundaries of Grant No. I.R 70118 dated 26th July, 1996 in respect of L.R No. 21919.

Whether the allocation of L.R No. 14231 to Uungani was lawful.

From the evidence before the court, Uungani was allocated what was described as "UNS. AGRICULTURAL PLOT B ATHI RIVER" through a letter of allotment dated 20th September, 1996. The plot was edged in red on plan No. MKS/8/96/6 said to have been attached to the letter. Uungani was supposed to accept the allotment and pay Kshs. 2,992,670/- for the same within 30 days. It is not clear from the evidence on record whether Uungani accepted this allotment. The letter of acceptance on record was written in 2002 and the same refers to another letter of allotment dated 24th January, 2002. As correctly observed by the plaintiff in its submissions, this letter of allotment dated 24th January, 2002 was not produced in evidence. I have however seen another letter of allotment on record in favour of Uungani. This one is dated 5th January, 1998 and it relates to "UNS. AGRICULTURAL PLOT "B" MAVOKO MUNICIPALITY". It differs from the letter of allotment of 20th September, 1996 not only with regard to the plot that was allocated but also the amount payable which is Kshs. 3,167,370/-, the plan reference which is MKS/8/97/6 and the postal address which is P.O. Box 51370, Nairobi. The authority under which the two letters were issued was also different. Uungani did not give satisfactory explanation for these two letters of allotment. It is not clear whether L.R No. 14231/1 which is said to be the same as the said "UNS. AGRICULTURAL PLOT "B" ATHI RIVER" and "UNS. AGRICULTURAL PLOT "B" MAVOKO MUNICIPALITY" was allocated to Uungani pursuant to the letters of allotment dated 20th September, 1996, 5th January, 1998 or 24th January, 2002. During the interlocutory proceedings herein, Uungani referred to the two letters of allotment interchangeably. At the trial, DW1 told the court that the letter of allotment dated 5th January, 1998 was issued when the stand premium was revised. No correspondence was placed before the court between Uungani and the Commissioner of Lands on the revision of the Stand Premium. I do not also think that such revision would have necessitated the issuance of a new allotment letter with not only the revised Stand Premium but also a change in the particulars of the land allotted and the Part Development Plan on which the allotment was based.

I have looked at the Kenya National Assembly, Tenth Parliament-Fourth Session, Report of the Joint Committee on Administration & National Security, Lands & Natural Resources, Local Authorities, and Transport Public Works & Housing on the Demolitions and Evictions in Syokimau, Kyangombe, KPA, Maasai & Mitumba Villages and Eastleigh. This report of the parliamentary committee (hereinafter referred to only as "the parliamentary committee") was filed in court by Uungani on 2nd October, 2012 as part of its supplementary list of documents and was referred to by the parties at the trial and in the submissions. The parties however relied only on the portions of the said report that favoured their respective cases. The report has given the court a lot of insight on the dispute between the parties and contains vital information on the dispute in view of the scope of the terms of reference of the committee that prepared the report and the diversity of the stakeholders and interested parties who appeared and gave evidence before the committee. In a letter dated 30th December, 2005, the Commissioner of Lands had denied that he had allocated L.R No. 14231 and L.R No. 13512 to Uungani and Mulolongo respectively. When the Commissioner of Lands appeared before the parliamentary committee, he told the committee that the letter of allotment dated 20th September, 1996 that was purportedly issued to Uungani in respect of "UNS. AGRICULTURAL PLOT "B" ATHI RIVER" was fake. The Commissioner of Lands took issue with the figures given for the annual rent and stamp duty which he said were not in accord with the normal computation of such charges. On a more serious note, the Commissioner of Lands told the parliamentary committee that the Part Development Plan (PDP No. MKS/8/96/6) on which the allotment was based was not for the so called "UNS. AGRICULTURAL PLOT "B" ATHI RIVER" but was unapproved PDP for two industrial plots situated in Athi River. This I believe may explain why Uungani had various letters of allotment for the same parcel of land two of which had different PDPs.

I have perused the various survey plans that were placed before me by the parties. There is a consensus as to when the parcels of land in dispute between the parties were created. The report of the Parliamentary Committee has shed some light on the reasons why some of the surveys that gave rise to some of the parcels of land were carried out. It is common ground that L.R No. 14231 and L.R No. 13512 claimed

by Uungani and Mulolongo respectively originated from L.R No. 3864. From the uncontested evidence on record; L.R No. 3864 was surveyed in 1931. L.R No. 3864 was acquired compulsorily by the Government in 1971 for the development of Nairobi Airport(JKIA). L.R No. 13512 was surveyed in 1985 and exercised from L.R No. 3864. L.R No. 14231 was surveyed in 1987 and excised from what remained of L.R No. 3864. L.R No. 14231 was subdivided in 2008 to give rise to L. R No. 14231/1 and L.R No. 14231/2.

It is common ground that L. R No. 21919 owned by the plaintiff was surveyed in 1996. It is common ground that during the survey that gave rise to L. R 21919 all the land that was comprised in L.R No. 3864 which was compulsorily acquired by the Government for the development of JKIA which included L.R No. 135212 and L.R No. 14231 that had been excised from it were included in L.R No. 21919. It is common ground that when “UNS. AGRICULTURAL PLOT “B” ATHI RIVER” and “UNS. AGRICULTURAL PLOT “B” MAVOKO MUNICIPALITY” which are claimed to be L.R No. 14231/1 were allocated to Uungani on 20th September, 1996 and 5th January, 1998 respectively, L.R No. 21919 had already been surveyed and was in existence. The Deed Plan for L.R No. 21919 is dated 21st May, 1996. L.R No. 14231/1 came into existence on 25th March, 2008 when its deed plan was signed and issued by the Director of Surveys. As at this date, the whole of L.R No. 14231 was already surveyed as part of L.R No. 21919.

According to the information that was given to the Parliamentary Committee by the Director of Surveys, L.R No. 14231 was created from L.R No. 3864 through Survey Plan No. FR 195/15 for the purposes only of “harmonization of co-ordinate system”. Although L.R No. 14231 was created in 1987, a portion thereof was purportedly allocated to Uungani in 1996/1998. There is no doubt that as at 21st May, 1996 when the survey that gave rise to L.R No. 21919 was completed and a Deed Plan issued, L.R No. 14231 was Government land and was part of L.R No. 3864 that was compulsorily acquired by the Government for the development of JKIA. As at 21st May, 1996 when L.R No. 14231 was included as part of L.R No. 21919, only the Government and the plaintiff had interest in the property. The property had not been allocated to Uungani or anyone else.

It is surprising that Uungani could be allocated land that was already surveyed and included as part of L.R No. 21919. It is even more shocking that the Director of Surveys could authorise a survey to be conducted for the purposes of subdividing L.R No. 14231 that was already included as part of L.R No. 21919 whose Deed Plan was authenticated and issued by the same Director of Surveys. Grant No. I.R 70118 for L.R No. 21919 was registered on 13th August, 1996. What this means is that the so called “UNS. AGRICULTURAL PLOT “B” ATHI RIVER” or “UNS. AGRICULTURAL PLOT “B” MAVOKO MUNICIPALITY” which is claimed to be L.R No. 14231/1 was already part of the land owned by the plaintiff when it was purportedly allocated to Uungani. This may explain why Uungani put up a spirited fight against Grant No. I.R 70118 for L.R No. 21919. I have also noted from Uungani’s said letters allotment that Uungani was supposed accept the allotment and pay for the “UNS. AGRICULTURAL PLOT “B” ATHI RIVER”/“UNS. AGRICULTURAL PLOT “B” MAVOKO MUNICIPALITY” which is claimed to be L.R No. 14231/1 within 30 days from the date of the allotment. The evidence on record shows that no payment was made by Uungani until 2002.

It is clear from the foregoing that the purported allotment of L.R No. 14231/1 to Uungani was marred with several illegalities and irregularities. In summary; the so called “UNS. AGRICULTURAL PLOT B ATHI RIVER”/ “UNS. AGRICULTURAL PLOT “B” MAVOKO MUNICIPALITY”/L.R No. 14231/1 that was allocated to Uungani was part of L.R No. L.R No. 3864 that was acquired by the Government for the development of JKIA. The land was therefore reserved and set apart for future development of JKIA and as such was not available for allocation to Uungani or any other person. I am not in agreement with the defendants that once that parcel of land was acquired by the Government for use by JKIA, the Government after giving a portion of it to JKIA for its immediate use could allocate the remainder to private developers. The land was acquired for the development of JKIA according to the Kenya Gazette through which it was acquired. The Government paid for the land through public funds for that purpose. The Government could not allocate any part of that land for others uses unless the needs of JKIA had been satisfied and JKIA no longer required the land.

In this case, as at the time of the purported allocation of part of L.R No. 14231 to Uungani, the whole of that land was already surveyed as part of L.R No. 21919 and a title issued to the plaintiff. L.R No. 14231 could not therefore be lawfully allocated to Uungani unless the title for L.R No. 21919 was cancelled and the purported land excised from it. In his witness statement dated 28th November, 2016, DW1 David Wambua Mila disclosed that L.R No. 14231 was allocated to them through political influence. He stated as follows in part; *“In way of trying to acquire land, we approached a politician, Councillor Mr. Mwololo then of Embakasi Ward.....At around mid 1990s, the councillor later introduced us to the late Hon. David Mwenje and we presented our case to him. We asked him to help us get the parcel of land that was G.L. He agreed but said we needed to raise money for the allotment document. The members of Uungani Settlement Self Help Group who used to operate a Borehole known as Uungani Borehole within Syokimau managed to raise Kshs. 360,000/- and gave it to the councillor and Hon. Mwenje who later used their influence and political muscle and brought to us an allotment letter at Hotel City Canabas. Mwenje told us to have our group registered and also form a constitution and open a bank account which we did. We stayed for quite a while with the allotment letter without doing anything.” (Emphasis added)*

Land allocated in this manner cannot be said to have been allocated lawfully. What the foregoing statement shows is that Uungani bought the letter of allotment at Kshs. 360,000/! There was no application for the land and no Part Development Plan(PDP) was prepared. With Kshs. 360,000/- in his hand, Hon. Mwenje did a miracle! Uungani had in its hand a letter of allotment of land measuring 449.9 hectares.

As I have mentioned earlier, as at 19th March, 2008 when a Deed Plan was being issued for L.R No. 14231/1, the Commissioner of Lands had in a letter dated 30th December, 2005 declared the purported allotment to Uungani as fake. It is not surprising therefore that no Grant or title deed was issued to Uungani for the parcel of land. For the foregoing reasons, it is my finding that L.R No. 14231/1 was not allocated to Uungani lawfully.

Whether the allocation and issuance of a title to Mulolongo in respect of L.R No. 13512 was lawful.

For the same reasons that I have given above, this allocation was also irregular and unlawful to put it mildly. It was in fact fraudulent. I will add a few other reasons why Mulolongo’s title to L.R No. 13512 is indefensible. From the evidence on record, L.R No. 13512 was allocated to Mulolongo through a letter of allotment dated 17th March, 1986. The land was indicated in the letter of allotment as situated in Athi River. Mulolongo was supposed to pay Kshs. 4,224,034/- for the allotment. I have noted from the evidence on record that Mulolongo was registered

as a Society under the Societies Act on 23rd September, 2002 under Registration No. 21754. I have noted from the record that Mulolongo acquired two titles for L.R No. 13512. The first title was purportedly issued on 5th March, 1993 under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) (RTA) as Grant No. 58266 registered on 9th March, 1986. The land was allocated to Mulolongo as surveyed land. The land was surveyed in 1985 and a Deed Plan issued on 11th November, 1986. This is the Deed Plan on the strength of which the purported Grant No. 8266 was issued. In the Deed Plan, the land is said to be located in the City of Nairobi. The Grant also refers to the land as situated in the City of Nairobi. This is inconsistent with the purported letter of allotment in which the land is indicated as situated in Athi River. Mulolongo also has a title deed purportedly issued on 9th October, 1995 under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) (RLA) for a parcel of land described as NRB/EMBAKASI/L.R 13512. In the title deed, Mulolongo is indicated as Society Registration No. 21764. A number of issues arise here; first, Mulolongo had not been registered as at 5th March, 1993 when it purportedly acquired its first title, Grant No. 58266 under the Registration of Titles Act or as at 9th October, 1995 when it purportedly acquired its second title, a title deed for NRB/EMBAKASI/L.R 13512. In the title deed, its Registration No. 21764 is given beside its name. This Registration No. 21764 was given to Mulolongo when it was registered on 23rd September, 2002. What this means is that these purported titles were not issued on the dates indicated on the faces thereof. They were backdated and as such are fake documents.

Like the allotment that was purportedly made in favour of Ungani, the purported allotment of L. R No. 13512 to Mulolongo was also disowned by the Commissioner of Lands in a letter to the plaintiff's advocates dated 30th December, 2005. The title was attacked heavily by the Commissioner of Lands during the parliamentary committee inquiry. The Commissioner reiterated before the committee that the two titles held by Mulolongo were fake. The Commissioner of Lands told the parliamentary committee that Grant No. 58266 held by Mulolongo in respect of L.R No. 13512 measuring 100 hectares was for another parcel of land known as L.R No. 17330 measuring 5.42 hectares situated along Mombasa Road and registered in the name of Alcon Holdings Limited. The Commissioner of Lands produced the two titles before the Committee; the one held by Mulolongo and that of Alcon Holdings Limited. Both Grants are bearing No. I.R 58266 and are issued on 5th March, 1993 and registered on 9th March, 1993. Mulolongo's Grant is however for L.R. No. 13512 situated in the City of Nairobi and measuring 100 hectares while the other Grant for Alcon Holdings Limited is for L.R No. 17330 measuring 5.420 acres and situated North West of Mavoko Township in Machakos. Looking at the two Grants side by side, there is no doubt that the one held by Mulolongo was an altered or forged version of the title belonging to Alcon Holdings Limited. With regard to Mulolongo's RLA title, the Commissioner of Lands told the parliamentary committee that Mulolongo had made an application through a private surveyor, J.R. Angano & Associates to convert its purported RTA title aforesaid to RLA. The Commissioner of Lands told the committee that his officers noted that Mulolongo's purported RTA title was not registered and as such was fake and declined to approve the attempted conversion. The Commissioner of Lands told the Committee that Mulolongo forged signatures in an attempt to convert the said non-existent RTA title to RLA. The Commissioner disowned the RLA title.

The Commissioner produced before the committee the correspondence exchanged with J. R. Angano & Associates on the issue of conversion of Mulolongo's purported RTA title. According to the correspondence, that I have perused, the application for conversion was made in May, 2009. This begs the question as to how Mulolongo got its RLA title Deed for NRB/EMBAKASI/KATANI/ L.R 13512. The title deed was issued on 9th October, 1995 as indicated on its face. As at this date, Mulolongo had not made an application to the Commissioner of Lands to convert its RTA title to RLA. This may explain why the title has a very strange number; NRB/EMBAKASI/KATANI/L.R 13512. As submitted by the plaintiff's advocates, the parcel number for this land is strange to say the least. I must admit that I have not come across anything like this. It is a true mixture of an RTA and RLA title. I have also noted from the purported title deed that the register for the parcel of land was opened on 11th November, 1986. That was the date when the Deed Plan for L.R No. 13512 was issued. Mulolongo had not even been allocated the land neither had it been issued with an RTA title. No one from Mulolongo gave evidence at the trial to explain all these inconsistencies and irregularities. I have no difficulty in the circumstances in concluding that the purported allotment of L.R No. 13512 to Mulolongo was illegal, fraudulent, null and void. The purported RTA and RLA titles issued to Mulolongo are similarly nullities. As a court of law, I am concerned that no one was charged for all these criminal acts.

Whether the defendants in the two suits trespassed on the suit property.

I have already made a finding above that Ungani and Mulolongo did not acquire any valid proprietary interest in L.R No. 14321/1 and L.R No. 13512 respectively. Their members and others who acquired their interests through them did not therefore have a right to be in possession of the two parcels of land that were within L.R No. 21919 owned by the plaintiff. Trespass is defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. In the case of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. I have already made a finding that the plaintiff is the lawful owner of the suit property. As the owner of the suit property, the plaintiff was at all material times entitled to possession thereof. The defendants who had no lawful cause to be on the suit property were therefore trespassers thereon.

Whether the defendants in ELCC No. 489 of 2004 were illegally evicted from L.R No. 14231 by the Plaintiff.

I have limited this issue to the defendants in ELCC No. 489 of 2004 because they are the ones who filed a counter-claim claiming that their eviction from L.R No. 14231/1 was unlawful. The defendants in ELCC No. 206 of 2004 did not raise any such claim in their defence and did not file a counter-claim. I will revert to this issue later when considering whether the defendants in ELCC No. 206 of 2004 are entitled to any relief.

I have held that the defendants were trespassers on the suit property. I am however in agreement with the defendants that even for trespassers, due process had to be followed in their eviction. The Kenyan Constitution guarantees a right to human dignity and personal safety. The parties were already in court when the eviction took place. The defendants had contended that the court had issued an order for the maintenance of status quo pending the hearing of the suit. I have not seen such order in the court record. Even in the absence of such order, I am of the view that since the parties were before the court, respect for the rule of law would have enjoined the plaintiff to wait for the determination of the dispute before evicting the defendants from the suit property. Furthermore, even if the defendants were to be evicted, the eviction had to be carried out in a humane and dignified manner. After watching the video clips that were played in court, I am in agreement with the defendants that their eviction was inhuman and the force used was excessive. The parliamentary committee reached the same conclusion in its report. The plaintiff had denied that it was involved in the eviction of the defendants. From the evidence before the court,

the eviction of the defendants was carried out by various government agencies and ministries. In the parliamentary committee report they are named as, the plaintiff herein, the Provincial Commissioner, Nairobi, Provincial Police Officer Nairobi, Deputy Provincial Police Officer and the Officer Commanding Police Division Embakasi. The land in dispute belonged to the plaintiff. It is the plaintiff who issued notices to those who were in occupation of the suit property to move out or risk eviction. The trespassers did not move and were forcefully evicted. I am satisfied from the evidence on record that the defendants were evicted from the suit property by the plaintiff with the assistance of the police. Since the defendants were evicted from the suit property in an inhumane manner in breach of their right to human dignity and security of their person, it is my finding that their eviction from the suit property was carried out unlawfully. I will expound on this issue in more detail later in the judgment when considering the reliefs available to the defendants.

Whether the defendants in ELCC No. 489 of 2004 suffered any loss and damage as a result of the said eviction.

I have already made a finding that the manner in which the eviction of the defendants in ELCC No. 489 of 2004 was carried out by the plaintiff was unlawful. I am satisfied from the evidence on record that the defendants in ELCC No. 489 of 2004 suffered loss and damage as a result of the said eviction.

Whether the plaintiff is entitled to the reliefs sought in ELCC No. 206 of 2004.

I have at the beginning of this judgment set out the reliefs sought by the plaintiff in ELCC No. 206 of 2004. The plaintiff sought a permanent injunction restraining the defendants in ELCC No. 206 of 2004 from advertising for sale, interfering with, alienating, sub-dividing or trespassing on the suit property or any portion thereof and general damages. I have made a finding that the purported allocation and issuance of title in respect of L.R No. 13512 to Mulolongo was fraudulent and illegal. Mulolongo did not therefore have any valid interest in the property that it could transfer to its officials, members and other third parties. I have held that Mulolongo was a trespasser on the suit property. The plaintiff is in the circumstances entitled to an order of injunction to restrain the defendants in ELCC No. 206 of 2004 from interfering with the suit property of which L.R No. 13512 form part. With regard, to general damages, the plaintiff is entitled to the same having established that the defendants in ELCC No. 206 of 2004 trespassed on the suit property by purporting to allocate the same to third parties. However, in view of the fact that the defendants were forcefully evicted from the suit property and are no longer in possession of the property, I will not award the plaintiff general damages for trespass. In its submissions, the plaintiff left the matter to the discretion of the court and did not propose any award.

Whether the plaintiff is entitled to the reliefs sought in ELCC No. 489 of 2004.

In ELCC No. 489 of 2004, the plaintiff sought in addition to a permanent injunction restraining the defendants in the suit from interfering with the suit property or any part thereof, a declaration that the letter of allotment dated 5th January, 1998 issued to Uungani in respect of an "Unsurveyed Plot "B" Mavoko Municipality" or L.R No. 14231 is void *ab initio* and general damages for trespass. I have made a finding that the purported allocation of Unsurveyed Plot "B" Mavoko Municipality" or L.R No. 14231 to Uungani was fraudulent and unlawful. Uungani and its members did not therefore acquire any valid interest in L.R No. 14231 or any part thereof. In the absence of any legal or equitable interest in L.R No. 14231, Uungani and its members had no right to enter the property or deal with the same in any manner whatsoever. I have held that they were trespassers on the property. The plaintiff is in the circumstances entitled to an order of injunction sought against the defendants in ELCC No. 489 of 2004. For the reasons that I have given earlier in the judgment, the plaintiff is also entitled to the declaration sought. For general damages, the plaintiff has proved that the defendants in ELCC No. 489 of 2004 were trespassers on the suit property. The plaintiff is entitled to damages for trespass. For the same reason that I have given in respect of the defendants in ELCC No. 206 of 2004, I will not award the plaintiff general damages against the defendants in ELCC No. 489 of 2004.

Whether the defendants in ELCC No. 489 of 2004 are entitled to the reliefs sought in their counter-claim.

In their Further Re-Amended Defence and Counter-Claim, the defendants in ELCC No. 489 of 2004 sought several declaratory reliefs and orders against the plaintiff. For the reasons that I have given earlier, the defendants in ELCC No. 489 of 2004 are not entitled prayers (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), and (l) in the Further Re-Amended Defence and Counter-Claim. Prayer (a) sought dismissal of the plaintiff's suit. Having held that the plaintiff has established its claim against the defendants in ELCC No. 489 of 2004, the relief cannot be granted. Prayers (b) and (d) were for a declaration that the plaintiff held two titles for JKIA land namely Grant No. 90243 for L.R No. 24937 and Grant No. 70118 for L.R No. 21919 and as such the same were null and void. I have held that Grant No. 90243 for L.R No. 24937 was issued prematurely in that the surrender of Grant No. 70118 for L.R No. 21919 had not been completed. Since Grant No. 70118 for L.R No. 21919 was not surrendered by the plaintiff, it is the only legal and valid title held by the plaintiff. In the absence of a surrender of Grant No. 70118 for L.R No. 21919, Grant No. 90243 for L.R No. 24937 could not be lawfully issued. From the evidence on record, I am in agreement with the plaintiff that Grant No. 90243 for L.R No. 24937 was a scheme hatched by land grabbers to excise a portion of L.R No. 21919 that had been lawfully surveyed and registered in the name of the plaintiff in the pretext that the same included Mombasa Road. I wonder how the excision of Mombasa Road which was less than 4 hectares from L.R No. 21919 ended up in the excision of over 215 hectares from that parcel of land. The defendants are therefore not entitled to the declarations sought with regard to the alleged two titles. Prayers (e) and (f) sought declarations that the defendants did not trespass on the suit property and that L.R No. 14231 was legally owned by the defendants. I have held that the defendants in ELCC No. 489 of 2004 trespassed on the suit property in that L.R No. 14231/1 which they wrongfully claimed to own was part of the suit property. The defendants are in the circumstances not entitled to the declaration. Prayer (g) sought an order that the National Land Commission does issue a title deed to the defendants' trustees in respect of L.R No. 14231 within 30 days of the date of the judgment herein. The court having made a finding that L.R No. 14231 was part of a larger parcel of land known as L. R No. 3864 that was acquired and reserved for the development of JKIA and as such was lawfully included as part of L.R No. 21919, there is no basis upon which this order sought by the defendants can be granted.

Prayer (h) was for a declaration that the defendants' legitimate expectation was grossly violated. In their counter-claim, the defendants did not explain the basis of their legitimate expectation more particularly from whom they had the expectation and what the expectation was. I believe that the defendants expectation if any was directed at the Commissioner of Lands and subsequently the National Land Commission that were not made parties to the suit. The expectation I believe was that they would be issued with titles in respect of L.R No. 14231/1 that was allegedly allocated to them. As I have stated earlier, the Commissioner of Lands had disowned the purported allotment of L.R No. 14231/1 to the defendants in ELCC NO. 489 of 2004 and termed the whole process leading to the issuance of the purported letter of

allotment a fraud. As I have already held, L.R No. 14231 was not available for allocation the same having been acquired and reserved for the purposes of developing JKIA. Neither the Commissioner of Lands nor the National Land Commission had a right, duty or obligation to allocate the land to the defendants or anyone else and to issue a title in respect thereof. The Commissioner of Lands and the National Land Commission also had no obligation to issue a title in respect of land that had been fraudulently allocated. For these reasons, I am not convinced that the defendants alleged expectation was legitimate. In their book, Administrative Law, 10th edition, H. W. R. Wade & C. F. Forsyth have commented as follows, at page 449, 450 and 451 on legitimate expectation:

“It is not enough that an expectation should exist; it must in addition be legitimate.....First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation.....Secondly, clear statutory words, of course, override any expectation howsoever founded (see R.vs. DPP exp.Keбилene [1999] 3 WLR 972(HL)). An expectation, whose fulfilment requires that a decision maker should make unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions and express in several that the expectation must be within the powers of the decision maker before any question of protection arises. There are good reasons why this should be so; an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting unlawful practice.”

The declaration sought relating to the violation of the defendants’ alleged legitimate expectation cannot therefore issue.

Prayer (i) sought the cancellation of the titles held by the plaintiff in respect of L.R No. 24937 and/or L.R No.21919. I have held that the lawful title held by the defendant is in respect of L.R No. 21919 and that the defendants have no lawful interest in the same since L.R No. 14231 was unlawfully and fraudulently allocated to them. Due to the foregoing, there is no basis upon which the title held by the plaintiff in respect of the suit property can be cancelled. Prayer (j) sought an injunction restraining the plaintiff from interfering with the defendants peaceful and quiet possession and occupation of L.R No. 14231. The court has held that the defendants have no lawful interest in L.R No. 14231 that forms part of the plaintiff’s L.R No. 21919. The defendants are therefore not entitled to the injunction sought. In prayer (k), the defendants have sought a declaration that the demolition of their structures and their eviction from the suit property was undertaken illegally and with impunity. I have already made a finding that the manner in which the defendants were evicted from the suit property was illegal. In prayer (l) the defendants have sought declarations that their rights under several Articles of the Constitution were violated and/or denied. In their submissions, the defendants did not explain the alleged rights and in what manner they were violated or denied. No basis has therefore been laid for the declaration. However, from the findings that I have made concerning the manner in which the defendants were evicted, I am satisfied from the evidence on record that the defendants’ rights under Articles 28 and 29 of the Constitution were violated. In prayer (m) the defendants sought a declaration that their rights under the International Human Rights Conventions and Treaties that the Republic of Kenya has subscribed to including International Convention on Economic, Social and Cultural Rights, International Convention on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UNHCR), the African Charter on Human Rights and Peoples Rights, the Vienna Declaration and program of Action, the Convention on the elimination of all Forms of Discrimination against Women were grossly and monstrously violated. Like the various articles of the Constitution that were alleged to have been violated, the defendants did not explain in their submissions in what manner these international treaties and conventions were violated in relation to them. Without such explanation, this declaration cannot be granted. In their last prayer, (n), the defendants sought a declaration and an order that the defendants be restored back to the position and status in which they were before the demolition and evictions that were carried out on 12th November, 2011 and/or in the alternative be compensated by way of special, ordinary and exemplary and/or aggravated damages as shall be assessed upon production of evidence and proof of damage at such time and terms as the court shall be pleased to direct. From the findings that I have made earlier in the judgment, the defendants were occupying the suit property illegally. The suit property was reserved for the development of JKIA which is a public facility. It was required for that purpose by the plaintiff. The defendants cannot therefore be reinstated onto the suit property neither can they be compensated for the loss of the portion of the suit property that they occupied illegally and from which they were evicted. The defendants unlike the petitioners in Mitu-Bell Welfare Society v The Kenya Airports Authority & 2 others, Supreme Court Petition No. 3 of 2018[2021]eKLR were not poor landless people residing in an informal settlement on public land whom the Supreme Court held had a right to housing from the Government. In the list of shareholders of Uungani, I have seen several companies and people referred to as Doctors and Engineers. These are not ordinary poor Kenyans eking a living in our informal settlements. Most of the defendants were victims of the officials of Uungani who illegally and fraudulently purported to acquire land belonging to the plaintiff which they in turn purported to sell to the other defendants whom they recruited as members at a fee. The defendants are not claiming L.R No. 14231 as squatters on public land but as the lawful owners of the land. Whatever the case, the defendants were entitled to humane treatment during their eviction from the suit property. Kenya is a democratic state guided by the rule of law in its affairs. Article 10 of the Constitution enjoins the Government, state organs, state officers and all persons to observe national values and principles of governance which include human dignity, the rule of law, public participation and human rights. The defendants were evicted from the suit property by the plaintiff with the assistance of the Government that provided security during the exercise.

Although there was no legislation on forcible evictions in place when the defendants were evicted, we had a Constitution in place that provided for national values and principles of governance. Article 28 of the Constitution guarantees a right to human dignity while Article 29 guarantees freedom and security of the person. Article 29 prohibits any form of violence on the person from either the public or private sources which includes physical or psychological torture. The defendants were entitled to enjoy these rights notwithstanding that they were illegally in occupation of the plaintiff’s land. The plaintiff had a duty to give them adequate notice and an opportunity to remove their personal items and other belongings from the suit property before eviction. A reasonable notice would also have enabled them to look for alternative accommodation and to voluntarily remove the structures that they had put up on the suit property. No evidence was placed before the court showing that there was any form of public participation or consultation before the forceful eviction was undertaken.

From the evidence that was adduced in court, the plaintiff gave a number of notices between 2008 and 2011 to those who had encroached on its land to vacate the same or risk forceful eviction. The last of such notices was issued on 15th September, 2011 about 2 months before the date of the eviction. Although Uungani claimed that the notices were not directed at them, I am satisfied that the notices were directed at all those who had encroached on the plaintiff’s land. Uungani was deemed as part of Syokimau residents. In DW3’s valuation and report he stated as follows while describing the land claimed by Uungani and Jumbo; “*The property is situated within a neighbourhood generally known as “Syokimau Estate” of the former Municipal Council of Mavoko and borders the eastern boundary of Jomo Kenyatta International Airport.*” The fact that the land that was claimed by Uungani and Jumbo was in Syokimau is clear even in the Parliamentary Committee Report. I am of the view however that these notices were not sufficient particularly when the plaintiff noted that none of the trespassers were moving out. In addition to posting these notices in the newspapers, some should have been taken to the defendants’

residences as only a handful could have had access to the newspapers. The plaintiff should also have engaged the defendants through the local administration channels on the intended eviction. None of these avenues were pursued. From the video clips that were shown in court, the eviction of the defendants was painful to put it mildly. I am of the view that the pain that was inflicted on those who were evicted could have been mitigated if the plaintiff would have delivered its eviction notices in a more participatory manner and had given those affected even on the day of the eviction some time to move out of the suit property. The defendants are entitled to special and general damages for the illegal manner in which they were evicted. I am not satisfied however that a case has been made out for exemplary or aggravated damages.

In proof of damages suffered, Uungani relied on the report and valuation by G.K. Mutugi & Associates that was produced in evidence by DW3. In the report, DW3 valued the land that was occupied by the shareholders of Uungani at Kshs. 19,003,750,000/-. In his evidence, DW3 stated that he carried out his valuation not on the basis of the acquisition of L.R No. 14231 by the plaintiff but on the basis of the beneficial occupation of L.R No. 14231 by the plaintiff for a period exceeding 8 years as at the time he was giving evidence. He stated that the defendants were forced to look for comparable accommodation elsewhere following their eviction. He stated that his valuation related to loss of use of the defendants' land and beneficial occupation of the same by the plaintiff. DW3 stated that he did not include damage to buildings and such other losses which each individual claimant was supposed to establish. DW3's valuation was therefore restricted to loss of land. As I stated earlier in this judgment, the defendants did not have a right or any entitlement to L.R No. 14231. In the circumstances, they are not entitled to compensation for the same. I have also noted that although the defendants who were sued and who lodged a counter-claim were 1065 in number, the valuation by DW3 as concerns the shareholders of Uungani related to over 2000 claimants. All these claimants are not parties to the counter-claim. Those who were not sued as defendants and in respect of which no counter-claim was made are not entitled to any compensation in these proceedings. There are also several plots referred to as public utility plots and open spaces in respect of which claims for compensation have been made. A part from the evidence relating to DW1 and DW4, no evidence was also placed before the court showing that the said 2000 claimants were shareholders or members of Uungani and that they had been allocated portions of L.R No. 14231 in respect of which they have sought compensation.

A part from the valuation report by DW3 that was only limited to compensation relating to land which I have held that the defendants are not entitled to, no other evidence was placed before the court by the defendants save for DW4 on the basis of which the court can award special damages. In their submissions, the defendants had submitted that they were entitled to Kshs. 288,547,680/- for valuation fees and a total of Kshs. 1,100,393,400/- for roads, water reticulation, electricity supply, planning and survey. The defendants had submitted that these claims were based on reports that were prepared by their engineers. No such report was produced in evidence at the trial. The report of Lujo Consulting Engineers dated 18th February, 2020 that the defendants attached to their submission is inadmissible as evidence. Evidence cannot be adduced through closing submissions.

I am in agreement with the submissions by the plaintiff on the law on special damages. Special damages must be specifically pleaded and strictly proved. The claims for valuation, roads, water reticulation, electricity supply, planning and survey are in the nature of special damages. The same were not pleaded with the necessary particulars in the counter-claim. The same applies to the claim by DW4 who had adduced evidence that she lost up to Kshs. 5,004,000/- as a result of the forceful eviction (See page 102 of Defence Exhibit 1). This claim was not pleaded. At the trial, these claims were also not strictly proved. The defendants are therefore not entitled to the sum of Kshs. 19,003,750,000/- claimed for loss of land and the other claims for special damages namely, Kshs. 288,547,680/- for valuation fees and a total of Kshs. 1,100,393,400/- claimed for roads, water reticulation, electricity supply, planning and survey.

This leaves only the claim for general damages. The difficulty I have with this claim is not whether it is payable as that is settled from my earlier findings but to whom it is payable. This award should be made only to those who were forcefully evicted from the suit property. As I have stated above, the defendants in ELCC No. 489 of 2004 who have brought a counter-claim against the plaintiff are 1065 in number. From the evidence on record, there is no doubt that all these people were not residing on the suit property or L.R No. 14231 claimed by Uungani. In his report, DW3 stated in paragraph 1.7 that after the subdivided plots were allocated by Uungani, Mulolongo and Jumbo to their shareholders, others commenced development while others fenced their plots pending development. In her witness statement dated 16th January, 2020, DW4 stated as follows in part; "*As a loyal unarmed citizen living in an area with just a few scattered homes undergoing development was it appropriate for police to come out on an attack mission as if the nation had been invaded by an enemy and was on fire? (emphasis added)*". This leaves no doubt that only a few of the defendants had settled on the suit property and as such were forcibly evicted. Apart from DW1 and DW4 none of the defendants gave evidence that he or she was evicted from the suit property. In his witness statement and oral evidence that he gave in court, DW1 talked generally. He did not tell the court who amongst the defendants had developed the plots that were allocated to them by Uungani and were in occupation thereof when the eviction took place. The burden of proof was upon the defendants. In the absence of proof that any other identifiable person was in possession of the suit property or L.R No. 14231 as at the time of the demolition and were forcibly evicted therefrom a part from DW1 and DW4, the court will conclude that only DW1 and DW4 were forcibly evicted from L.R 14231. It is therefore only DW1 and DW4 who are entitled to general damages. As for the quantum of such damages, the defendants did not propose any figure. After considering the totality of the evidence before the court on the demolition exercise that was carried out by the plaintiff with the assistance of the security provided by the Government and the effect it had on those concerned, I would have awarded DW1 and DW4 Kshs. 1,000,000/- each as general damages. I however have a problem with DW4. Although she gave evidence as one of the defendants in ELCC No. 489 of 2004, her name is not in the list of the defendants who were sued by the plaintiff in ELCC No. 489 of 2004 and who had filed a counter-claim against the plaintiff. Since DW4 is not a defendant and did not file a counter-claim against the plaintiff, she is not entitled to an award of damages.

Whether the defendants in ELCC No. 206 of 2004 are entitled to any relief

The defendants in ELCC No. 206 of 2004 did not file a counter-claim against the plaintiff. I also noted that none of the defendants in ELCC No. 206 of 2004 gave evidence in their defence to the plaintiff's claim. In the circumstances, there would be no basis for any award in favour of the defendants in ELCC No. 206 of 2004.

Whether the interested parties namely, Jumbo Community Self Help Group and Mavicor Self Help Group are entitled to any relief.

As I have stated earlier in the judgment, the interested parties did not file any pleadings in the consolidated suits. They did not also give evidence at the trial. Since they only joined the suit as interested parties and did not make any claim against the plaintiff or any other party to the suit, the interested parties are not entitled to any relief or award although DW3 gave evidence regarding the loss that is said to have been

suffered by Jumbo and submissions were made in respect thereof. Both the evidence of DW3 with regard to Jumbo's loss and the submissions made in relation thereto had no basis in the pleadings and as such cannot be a basis for the making of any award to Jumbo.

Who is liable for the costs of the two suits?

Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. I am of the view that in the circumstances of this suit it would only be fair that each party bears its own cost.

Conclusion

In conclusion, I hereby make the following orders:

1. Judgment is entered for the plaintiff in ELCC No. 489 of 2004 in terms of prayers (a) and (b) of the Further Amended Plaint dated 27th August, 2008.
2. Judgment is entered for the plaintiff in ELCC No. 206 of 2004 in terms of prayer (a) of the Amended Plaint dated 5th October, 2006.
3. The defendants counter-claim in ELCC No. 489 of 2004 is dismissed save for a claim for general damages for illegal eviction in respect of which a sum of Kshs. 1,000,000/- is awarded to the 1st defendant, Wambua Mila.
4. Each party shall bear its costs of ELCC No.489 of 2004 and ELCC No. 206 of 2004.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nyiha and Mr. Mare for the Plaintiff

Mr. F.W. Kimeria and Mr. A.L. Kariu for the Defendants

Ms. C. Nyokabi-Court Assistant